A 000 695 374 9
UC SOUTHERN REGIONAL LIBRARY FACILITY

T
W69455s
1824

UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW
LIBRARY

From the Author

Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

http://www.archive.org/details/treatiseonspring00wilsiala

A

TREATISE

ON

SPRINGING USES,

AND

OTHER LIMITATIONS BY DEED,

CORRESPONDING WITH

Executory Devises;

ACCORDING TO THE

ARRANGEMENT IN MR. FEARNE'S ESSAY.

By JOHN WILSON,

OF LINCOLN'S INN, ESQ. BARRISTER AT LAW,

EDITOR OF ROBINSON ON GAVELKIND AND BOROUGH ENGLISH.

LONDON:

PRINTED BY A. STRAHAN,

LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;

FOR J. & W. T. CLARKE,

LAW BOOKSELLERS AND PUBLISHERS, PORTUGAL-STREET,

LINCOLN'S INN.

1824.

W69455s
1824

PREFACE.

MR. FEARNE, in his essay on contingent remainders and executory devises, intimates (*a*), that future and shifting uses, and other springing and executory interests, which are not remainders, are to be considered as subject to the same limits and restrictions as executory devises. His very learned Editor also observes (*b*), that executory devises are the immediate subject of the second part of Mr. Fearne's essay, but that his positions and illustrations are always, either directly or indirectly, referrible to the general doctrines of law, on all limitations of this description either in deeds or wills.

It appeared to the compiler of the present treatise, that Mr. Fearne's inestimable work might be rendered in some degree more per-

(*a*) P. 441. (*b*) Mr. Butler's edition, p. 385.

791230

fect, and its utility increased, by a collection and analysis of authorities, in illustration of his positions with reference to such limitations by deeds; and particularly as, from the difference in the nature and construction of deeds and wills, some distinctions must necessarily exist between those limitations and executory devises.

To supply such a collection, and exemplify such distinctions, is the principal object of the following pages, which are submitted to the profession, with the consciousness that a charge of temerity may be incurred by the attempt, but in the hope that it has not been made without due consideration.

The arrangement of Mr. Fearne has been closely adhered to, and the subdivisions of Mr. Butler have been adopted, so that the corresponding passages in the two books will be found under the same chapter and section.

2. *New Square, Lincoln's Inn,*
August 1*st*, 1824.

NAMES OF CASES CITED.

Abraham *v.* Twigg, 101, 115
Adams *v.* Savage, 69, 154
Arundell, Lady, *v.* Phipps & Taunton, 43, 45, 46
Avelyn *v.* Ward, 57
Baker *v.* Bayley, 138
Barlow *v.* Salter, 121
Battersbee *v.* Farrington, 43
Beck's Case, 99
Benson *v.* Hodson, 64
Blake *v.* Blake, 138, 141
Boreton *v.* Nichols, 99
Bostock's Case, 67
Bromfield *v.* Crowder, 21
Buckler's Case, 164
Buckmere's Case, 77
Bullock *v.* Knight, 87
Burnell *v.* Crutchley, 94, 96
Cadogan *v.* Kennett, 30, 34, 35, 38, 45, 62
Campbell *v.* Sandys, 139
Campion *v.* Cotton, 39, 45
Carpenter *v.* Smith, 9, 25, 67
Carwardine *v.* Carwardine, 3, 65
Cholmondely, Marquis of, *v.* Lord Clinton, 80
Clere's Case, Sir Edward, 151
Clifton *v.* Chancellor, 37
Coltman *v.* Senhouse 78
Crisp *v.* Pratt, 44
Crump d. Woolley *v.* Norwood, 15, 26
Dafforne *v.* Goodman, 126
Davies *v.* Speed, 8, 66, 73, 144
Dillon *v.* Dillon, 141
Doe d. Davy *v.* Burnsall, 13, 26
Doe *v.* Lyde, 119
Doe d. Roake *v.* Nowell, 22
Doe d. Roake *v.* Randall, 22
Doe *v.* Webber, 116
Doe d. Dyke *v.* Wittingham, 25, 72
Edwards *v.* Hammond, 20
Emily *v.* Grey, 44
Exel *v.* Wallace, 106, 116, 131
Focus *v.* Salisbury, 52
Foley *v.* Burnell, 46, 93
Fonnereau *v.* Fonnereau, 145
Forster *v.* Forster, 134
Forth *v.* Chapman, 111
Fryer *v.* Flood, 44
Glaister *v.* Hewer 44
Goodman *v.* Goodright, 81
Goodtitle *v.* Billington, 6

Goodtitle d. Weston *v.* Burtonshaw 71, 156
Goodtitle *v.* Morse, 160
Goodwin *v.* Clark, 109
Gore *v.* Gore, 68
Goring *v.* Bickerstaff, 27
Gower *v.* Grosvenor, 93
Grafton, Duke of, *v.* Lord Euston, 133
Grey *v.* Mannock, 140
Gulliver *v.* Wickett, 11, 26, 54
Halloway & others *v.* Millard & others, 43
Hartop *v.* Hoare, 46
Harwell *v.* Lucas, 67
Haselington & another *v.* Gill & another, 45
Havergill *v.* Hare, 167
Helps *v.* Hereford, 160, 3
Heywood *v.* Maunder, 104, 109, 117, 147
Higgins *v.* Dowler, 29, 147
Hoare *v.* Parker, 46
Hobson *v.* Trevor, 160
Hodgson *v.* Bussey, 127, 131
Holcroft's Case, 155
Idle *v.* Cook, 99, 115
Jarman *v.* Woollaston & another, 45
Jervoise *v.* the Duke of Northumberland, 97
Jones *v.* Morgan, 79
Jones d. Roe *v.* Perry, 157
Kent, the Earl of, *v.* Seward & Scott, 165
Kentish *v.* Newman, 61
King *v.* Cotton, 123
Kirsley *v.* Duck, 82
Lamb *v.* Archer, 150
Lilly *v.* Osborn, 44
Littleton *v.* Marlow, 44
Lockyer & others *v.* Savage & others, 44
Loddington *v.* Kime, 14
Loeffes *v.* Lewen, 43
Longhead d. Hopkins *v.* Phelps, 85, 109
Lloyd *v.* Carew, 9, 26, 48, 73
Lytton *v.* Lytton, 79
Macclesfield, Earl of, *v.* Davis, 38, 46
Mainwaring *v.* Baxter, 82
Marsden *v.* Panshall, 46
Massenburgh *v.* Ash, 30, 73, 75, 105, 147
Milborn *v.* Dashburne, 78
Moore Nicholas, Case of, 50
Moore *v.* Parker, 81
Mullineux's Case, 51
Newcastle, Duke of, *v.* the Countess of Lincoln, 89, 90, 94, 97, 147
Norfolk's Case, Duke of, 63, 103, 117
Norton *v.* Frecker, 132
Oakes *v.* Chalfont, 29, 121
Ormond's Case, the Earl of, 151
Parker *v.* Patrick, 46
Partridge *v.* Gopp, 43
Peacock *v.* Spooner, 125
Pearse *v.* Reeve, 81, 120
Peck *v.* Parrot, 170
Pells *v.* Brown, 49
Penhay *v.* Hurrell, 152
Porter *v.* Bradley, 115
Pybus *v.* Mitford, 152
Rawley *v.* Holland, 69, 154
Roe *v.* Griffiths, 156
Roe *v.* Jeffery, 116

Romilly, Knt. *v.* James, 51
Sackvile *v.* Dobson, 28
Selwyn *v.* Selwyn, 157
Shaftesbury *v.* Russell, 35
Smith *v.* Belay, 2
Smith *v.* Warren, 51
Southby *v.* Stonehouse, 113
Spalding *v.* Spalding, 61
Stansfield *v.* Habergham, 171
Taylor *v.* Chambers, 37
Taylor *v.* Jones, 43, 44
Taylor *v.* Phillips, 161
Theebridge *v.* Kilburne, 88, 125, 128
Thomasin *v.* Mackworth, 52
Tomkins *v.* Pooley, 33
Tucker *v.* Cosh, 44
Vaughan *v.* Burslem, 93
Vick *v.* Edwards, 161, 3, 4
Walker *v.* Burrows, 44
Ward *v.* Bradley, 129
Ward *v.* Shallett, 43
Warman *v.* Seaman, 82
Wasteney's *v.* Chappell, 133
Weale *v.* Lower, 7, 25, 78, 151, 161, 4
Webb *v.* Webb, 88, 125, 127
Williams *v.* Jekyl, 142
Wills & others *v.* Palmer & others, 154
Winchelsea, Earl of, *v.* Wentworth, 9, 26, 73, 169.
Woodliff *v.* Drury, 8, 27, 150
Wright *v.* Cartwright, 30, 62
Wright *v.* Wright, 159, 163, 8

A TREATISE, &c.

CHAPTER I.

SPRINGING USES, AND OTHER LIMITATIONS CORRESPONDING WITH EXECUTORY DEVISES DEFINED AND DISTINGUISHED.

1. CONDITIONAL limitations, secondary, future, springing, or shifting uses, are limitations of future estates or interests in real property, which the law admits, in deeds operating under the statute of uses, though contrary to the rules of limitation in conveyances at common law. (*a*)

(*a*) The distinction between conveyances at common law, and those which derive their effect from the Statute of Uses, is explained by Mr. Butler in a note to Mr. Fearne's Essay, p. 417.

Such of those limitations as arise from the act of some person, authorised to raise or appoint them, are said to arise by the execution of a power.

Such of them as arise upon an event provided for by the deed which creates them, and limitations of personal property, are the subject of this treatise.

Whenever a future interest is so limited, as to fall within the rules prescribed for the limitation of contingent remainders, or that it may take effect as a remainder, it can never take effect as a conditional limitation or future use.

The case of *Smith* v. *Belay* (*b*) was a limitation to the use of R. for life, and after, of his eldest issue which should be at the time of his death, remainder in fee to S. R. had issue J.; R. and S. made a feoffment, and levied a fine, with warranty and proclamation. J. could not enter on the death of R., for the limitation was a contingent remainder, and was destroyed by the feoffment and fine.

The limitation to the issue did not operate to divest or determine, but was to commence from the expiration of the preceding estate, which was capable in its nature, of supporting

(*b*) Cro. Eliz. 630.

a remainder; nor was the limitation contrary to the rules of conveyances at common law; it could not therefore, be construed a conditional limitation.

Cawardine v. *Cawardine* (*c*) was the case of a settlement, previous to the marriage of J. C., by which the lands in question were conveyed to trustees and their heirs, to the use of J. C. (the settler) for life; remainder to M. W. (his intended wife) for life (except in such cases as should be thereafter excepted) for her jointure; remainder to the heirs of the body of the said J. C., begotten on his said intended wife; remainder to the said J. C. and his heirs; followed by a "proviso, and the special trust and confidence in the said trustees and their heirs were thereby declared to be, that if the said J. C. should happen to die, and leave such issue as aforesaid behind him, he, the said J. C., not making otherwise a provision for such child or children in his lifetime, then and in such case the said trustees should stand seised of one moiety of the said premises, from and immediately after the decease of the said J. C., to the use of such child or children as aforesaid, and be empowered, out of the rents, issues, and profits of

(*c*) 1 Eden's Ch. Ca. 27.

the said moiety, to raise such provision for such child or children as the said trustees and their heirs should think fit."

J. C. and M. his wife, after their marriage, joined in levying a fine; and he, by will, devised all his estate from his eldest son, who was totally disinherited and left wholly unprovided for.

The principal question in the case was, whether the plaintiff, who was the eldest son of J. C., was entitled to any, and what provision, under the proviso in the said settlement.

The Lord Keeper *Henley*, after entering into a consideration of the intention of the parties, observed upon the legal operation of the deed, that it was admitted it must be either a springing use or a contingent remainder; whichever it was, the consequence was also admitted, if that was once known. That he did not know by what rule of law he could construe that a springing use; springing uses were introduced to answer the exigencies of mankind, in providing for all the contingencies in their families, in like manner as executory devises were allowed of; in order that, after a departure with the whole fee, a new limitation of the fee might take place, upon a contingency to arise within a

reasonable compass of time, and not within the danger of a perpetuity; not that a fee could be limited upon a fee, but upon the contingency happening, the former uses were to give way. And he did not recollect any case, where a springing use had been created in the middle of other uses, but always determined the first limitation of the fee, and displaced the first gift, and changed the uses in favour of other persons. And that it made no difference, whether the whole fee was given away at once, or in particular estates, and by way of remainders. That it was a certain rule of law, that if such a construction could be put upon a limitation, as it might take effect by way of remainder, it should never take place as a springing use, or executory devise. That the best construction he could put upon the limitation, was that of its being a contingent remainder; and that the limitations ought to stand thus: *viz.*, to husband for life; remainder as to one moiety, to the wife for life; remainder as to the other moiety, to the children during the wife's life, if they are left unprovided for; remainder as to this moiety, to the wife for life; remainder of the whole, to the heirs of the body of the husband; remainder to the husband and his heirs. Now if this estate was executed, he

could give it no other construction than what a court of law would do; and he was of opinion it was executed, and not an estate executory remaining in the trustees. That he must determine according to the legal operation of this deed, and as he thought it was a contingent remainder, the consequence was clear, that the fine had destroyed it, and that the plaintiff's bill must be dismissed.

And in *Goodtitle* v. *Billington* (*d*), Lord *Mansfield*, in delivering the opinion of the court, said, it was perfectly clear and settled, that where an estate can take effect as a remainder, it shall never be construed to be an executory devise or springing use.

And where the contingent estate may, in the nature of its original limitation, take effect during, or at the time of the determination of the particular estate, the possibility or probability of its not doing so, in the common course of things, or from its relation to other interposed limitations, will not take it out of the general rule now under discussion.

Thus, if real estate be limited to the use of A. for life, remainder to his wife for life, remainder to E. (his son) for 99 years, if he should so long live; and after the deceases of

(*d*) Dougl. Rep. 725.

A., and his wife, and E., to the sons of E., as tenants in common in tail: the death of the father and mother during the life of the son, is highly probable, and is obviously contemplated in the creation of the limitations; yet, in that event, the limitation to the sons of E. must fail as a remainder, for want of a particular estate to support it; but A. or his wife may survive E., and that limitation would then take effect as a remainder, and it cannot therefore be maintained as a springing use.

But where a future interest, without a preceding estate, or a contingent interest unsupported by any preceding freehold, or any estate after a preceding vested fee simple, is limited by way of use, such limitation, as it cannot be good as a remainder, may take effect as a conditional limitation or springing use, provided it falls within the limits which the law prescribes, for the validity of such future estates; which limits will be hereafter stated; and in this place, a few instances will be adduced, of such limitations, and uses as have been mentioned.

Thus, according to the *dictum* of Lord *Hale* C. J., in *Weale* v. *Lower* (*e*), if a feoffment be

(*e*) Poll. 65.

made, to the use of C. and his heirs, after the death of A. and B., this is no remainder, but a future use. So if the limitation of a use be, that after two years, or after the death of John Stiles, it shall be to the use of J. N. in fee, this is a future use.

And in *Davies* v. *Speed* (*g*), *Holt* C. J. said, a feoffment to the use of another and his heirs, to commence four years from thence, is good as a springing use; so it is if it [the use] were to commence after the death of another without issue, if he die within twenty years.

In these cases no preceding estate is supposed to be limited, and the future interest would be vested.

The effect is the same if the future interest be contingent.

Thus in the case (*h*) of a feoffment by A., to the use of himself and B. his *feme*, that should be, after their marriage, and of the heirs of their bodies; on the marriage this new use arises and vests.

So if there be a preceding estate, not capable in its nature of supporting a remainder: as a limitation to the use of trustees for 500 years, in trust to pay an annuity to T. for

(*g*) Holt's Rep. 731.

(*h*) *Woodliff* v. *Drury*, Cro. Eliz. 439.

life, remainder to the eldest son of T. (who has no son at the time) this would be good as a future use.

And the following are instances of limitations, after a preceding vested fee-simple.

In *Carpenter* v. *Smith* (*i*), land was limited, by deed and fine, to the use of J. his heirs and assigns for ever; and if J. died before W., then to the next heir of W., and to the heirs and assigns of such next heir. The court was of opinion that the limitation, being by way of use, was good.

The *Earl of Winchelsea* v. *Wentworth* (*k*) was a limitation to J., the second son [in fee], proviso that if the eldest son died without issue, J. should, within six months after the death of the eldest son, pay 1500*l.* to a sister, or in default thereof, the land to go to the sister and her heirs. The eldest son died without issue, and the sister died within the six months; J. refused to pay the 1500*l.* It was decreed that the land should go to her heir.

And in the case of *Lloyd* v. *Carew* (*l*), where lands were limited, by marriage-settlement, to the use of A. and his wife for their lives, remainder to trustees and their heirs during the lives of A. and his wife, to pre-

(*i*) Poll. 70. Keb. v. 3. p. 18. 92. 122. 176.

(*k*) 1 Vern. 402.

(*l*) Show. Parl. Cas. 137.

serve contingent remainders, remainder to the first and other sons of the marriage successively in tail male, remainder to the right heirs of A.; with a proviso, that if no issue of the marriage should be living, at the decease of the survivor of the husband and wife, and the heirs of the wife should, within twelve months after the decease of the survivor of the husband and wife, pay 4000*l.* to the heirs or assigns of the husband, then the remainder in fee-simple, so limited to the husband, should cease, and thenceforth should remain to the use of the heirs of the wife. The House of Lords held this springing use to the heirs of the wife to be good.

In the Treatise on Executory Devises, Mr. Fearne states, that even where there is a limitation after a devise in fee-simple, though such antecedent devise in fee be not vested but contingent, yet if the ulterior devise is so limited as to take effect in defeazance of the estate first devised, on an event subsequent to its becoming vested, it has been held to operate as an executory devise.

This doctrine is equally applicable to conditional limitations and springing uses; it has been the subject of considerable discussion, and deserves particular consideration.

Mr. Fearne cites, in exemplification of his

position, the case of *Gulliver* v. *Wickett* (*m*), where a testator devised lands to his wife for life, and after her death to such child as she was then supposed to be *ensient* with, and to the heirs of such child for ever; provided, that if such child as should happen to be born should die before the age of 21 years, leaving no issue of its body, the reversion should go over.

The wife of the testator was not with child, and the question for the consideration of the court was, whether the devise over was a good devise or not; and it was held that the birth of a child was not a condition precedent, and that whether the limitation to the child never took effect, or whether it did and was determined, was the same thing; and that as the remainder to the child never could take place, the next devise over must take effect.

Mr. Fearne, in commenting on this case, observes (*n*), that the court held it to be a devise to the wife, remainder to the child in contingency in fee, with a devise over, which he says they held a good executory devise, as it was to commence within 21 years after a life in being, and that if the contingency of a child never happened, then the last remainder

(*m*) 1 Wils. 105. (*n*) P. 396.

was to take effect upon the death of the wife. And that the number of the contingencies were not material, if they were all to happen within a life in being, or a reasonable time after.

And after noticing an observation of the reporter on this case, that the court used a difference of phraseology, *viz.* executory and remainder, in respect of the same limitation, from whence it seemed to him uncertain, whether they determined it an executory devise or a contingent remainder, Mr. Fearne intimates, that this doubt would have been prevented, by adverting to the language of the court, when they said it was good as an executory devise, as it was to commence within 21 years after a life in being; and that the number of contingencies were not material, if they were to happen within a life in being, or a reasonable time after; neither of which circumstances hath any sort of relation to a contingent remainder, or can be understood as applicable to the idea of it. And he further remarks, that although one of the contingencies on which the ulterior devise was construed to depend, *viz.* there being no child to take as supposed, must have been decided immediately on the determination of the particular estate, without the antecedent limitation in fee ever becoming vested, and

therefore such devise would, had it depended on that event only, have been considered as a contingent remainder, equally with the alternative one to the child; yet that the other event, and that indeed on which the limitation over was expressly limited to take effect, *viz.* the death of the supposed child under the age of 21 years, could not possibly happen till after the fee-simple had actually vested in such child on its birth; in which case it clearly could not operate as a remainder, and therefore must have been void in its creation, if not allowed to ensue as an executory devise.

But it is difficult to distinguish the last mentioned case from *Doe* d. *Davy* v. *Burnsall* (*o*), which was a devise of all the testator's estates, to M. and the issue of her body, as tenants in common; but in default of such issue, or, being such, if they should all die under 21, and without leaving issue, then over. After the testator's death, M. suffered a recovery and levied a fine of the lands, and she never had any issue.

And Lord *Kenyon* C. J. observed, "the devisor seems to have reasoned thus, if the children of my niece live to attain the age

(*o*) 6 T. R. 30.

of 21, when they will be qualified to dispose of this property prudently, I give it to them in fee; if they happen to die under 21, and without leaving issue, then I will consider to whom I can best dispose of the estate, and in such an event, I will give to my collateral relations. That brings the present case within that of *Loddington* v. *Kime* (*p*), which is the leading case upon this subject, and converts all the subsequent limitations into contingent remainders. Those depended on the particular estate given to the niece, and she having destroyed this particular estate, before they could take effect, they consequently fell to the ground. Perhaps the devisor was not aware, that the niece could destroy the estate given to her children; but the plaintiff's argument goes to admit that she had that power; and it is a necessary consequence of our putting such a construction on the will, as will best effectuate the intention of the devisor. In determining the present case, I proceed on the words of the will, giving legal effect to every word contained it; and they all lead to this conclusion, that it was a contingency with a double aspect; if M. had any children, the estate was limited to them in fee; if she had no children, or if she had any, and they

(*p*) Salk. 224.

died under 21 and without issue, then it was to go to the lessor of the plaintiff. But all these rested in contingency; and the particular estate of freehold, by which they were supported, having been destroyed before they were capable of taking effect, they were also destroyed with it."

The case of *Crump* and *Woolley* v. *Norwood*(*q*), is similar to *Gulliver* and *Wickett*, so far as regards the question which arose in that case. It was a devise of gavelkind land to the testator's three nephews, sons of his brother J., during their lives, as tenants in common; and after their respective decease, the share of him or them so dying, unto the heirs lawfully issuing of his and their body and bodies respectively, and if more than one, equally to be divided, as tenants in common; and if but one, to such only one, and to his, her, or their heirs; and if any of his said nephews should die without such issue, or leaving any such, they all should die without attaining 21, then the share of him and them so dying, unto the survivor and survivors of his said nephews, and the heirs of the body of such surviving and other nephew, equally, as tenants in common, and to hold the same as he had thereinbefore directed as to the original

(*q*) 7 Taunt. 362.

share, and with the like contingency of survivorship on failure of issue. And for want, or in default of such issue of his nephews, unto his own right heirs. The testator died leaving his said brother J., and the son of another brother, his co-heirs in gavelkind. J. died leaving his three sons surviving. Afterwards William, one of the three nephews, died without ever having had any issue. The case related to his share only.

Best, Serjeant, contended, that by the limitation, the nephews took a life estate, and the heirs of the bodies of the nephews (or children) a remainder in fee, as purchasers; and that this was not a substitutionary contingent remainder, but an executory devise; and in support of this he cited *Gulliver* and *Wickett*, and the language attributed to the Court in the report of Mr. Serjeant Wilson, and the observations of Mr. Fearne; and he observed that though a child of the nephew were born, it was possible that he might die before 21, and until that time, therefore, the estate was defeasible. Consequently, it could not be good as a contingent remainder; it was either void, or it was an executory devise. It was not a substitutionary fee, because the whole fee was given away, and yet, in certain events, the fee first given might take effect, and, nevertheless, the

subsequent limitation might, in certain events, take place after it.

Onslow, Serjeant, *contrà*, contended that this was not an executory devise, but a contingent remainder. And he observed, that though both estates were given to the same person, yet there were two estates; and the one might be good, the other not. He supposed the case of a devise to A. for life, remainder to the first son of A. in fee; but if the first son of A die under 21, then to X. in fee; and if there be no son of A., then to W. in fee. Here, he said, are two different estates and two different devises; and the devise to one may be good, to the other may be bad; and it makes no difference though both estates are given to one person.

The Court, after taking time to consider, held the devise to be to William for life, and if he has children, then to them in fee; if he has no children, then to the testator's other two nephews; and the only question was, whether the descent on William of a portion of the reversion destroyed the contingent remainders, *pro tanto*.

Gibbs C. J., in delivering the judgment, after stating the facts, observed, that "the defendant contended that this was a contingent remainder, descending on William, which

required a particular estate to support it; and that the particular estate being merged in the fee, the contingent remainder was destroyed with it. That the plaintiff said the contingent interest was not destroyed by unity of estate, because it was not a contingent remainder but an executory devise, for it was not to take effect but on the decease of the children of the first grantee under 21, and, therefore, was not supported by the particular estate given to William, because it was not to take effect on the decease of William. These are the points on which the case depends. On the decease of William it must be determined whether he has children, who are to take in the one event, or whether the persons who are to take, in the event of his having no children, are to succeed; this must be determined on the decease of William; and, as a contingent remainder may be limited with a double aspect, where one or the other of two limitations must take effect on a certain event, I see no reason why this should not fall within that class of cases. But it is said it cannot be so, because there is one event which may not then take effect, viz., that of the nephews having children, and the children dying under 21, after the decease of the tenant for life. It is true that it may so happen, but that is not

the event which has happened, and I can find no principle on which we are called on to determine that, because there are two limitations depending upon several events, one of which may possibly not take effect within the limits which the rule of law prescribes, therefore, the other, dependent on an event which necessarily conforms to the rule of law, shall not be effectual if that event happens." He then cited the case of *Davy* and *Burnsall*, and continued, " on precedent, therefore, as well as on principle, we think so much of the contingent remainder as was co-extensive with the portion of the reversion which descended to William, the nephew and devisee for life, was thereby destroyed."

Upon the authority of the cases of *Davy* and *Burnsall*, and *Woolley* and *Norwood*, it must be admitted that, in the event which happened, the limitation over in *Gulliver* and *Wicket* would now be considered a contingent remainder, and not an executory devise, and, consequently, that case is not an authority for the doctrine in question.

None of these cases, however, in the events which happened, and according to the construction which was adopted, involved the position which we are now considering; the ulterior devises did not take effect in defeas-

ance of the estates first devised, on an event subsequent to their becoming vested, for, no child having been born, the estates first devised never did vest; and the question, whether, in those cases, if a child had been born and died under 21 without having had any issue, the ulterior devises would have taken effect, is not decided by those authorities; and it is submitted that they would have been allowed to operate as executory devises.

Some of the expressions of Lord *Kenyon* in *Davy* and *Burnsall*, and of *Gibbs* C. J., in *Woolley* and *Norwood*, may seem to convey an intimation that the limitations to the children were contingent upon the event of their attaining 21, and as such a construction would materially affect our argument *in limine*, it is necessary to consider that point with attention.

In the cases now under consideration, there are no words which even appear to import that attaining 21 was a condition precedent, and in a large class of cases where such words have been found, they have not been so construed:

As *Edwards* v. *Hammond* (*r*), which was a

(*r*) 1 New Rep. 324.

surrender of customary lands, to the use of the surrenderor for life, and after his decease, to the use of J. and his heirs, if it should happen that J. should live until he attain 21; provided that if it should happen that J. should die before he attain 21, then over. The surrenderor died, leaving J. under 21; and it was held that he took a vested estate.

Also in *Bromfield* v. *Crowder* (*s*), where the testator devised, in substance, to R. for life, and at his decease to D. in fee, if he should live to attain 21; but in case he died before he attained that age, and C. should survive him, then to C. if he lived to attain 21. D. was under 21 at the death of the preceding devisee; it was held that D. took a vested estate in fee, determinable upon the contingency of his dying under 21.

The judgment in the last noticed case was affirmed in the House of Lords.

It may be contended that there is a distinction between the cases in question, and those of *Edwards* v. *Hammond*, and *Bromfield* v. *Crowder*, inasmuch as in the former cases, until a child was born there was no person *in esse*, in whom the estates limited to the children could vest; but in the latter, the estates

(*s*) 1 New Rep. 313.

in remainder were given to persons then capable of taking.

But in *Doe* d. *Roake* v. *Nowell* (*t*) that distinction did not exist; the testatrix devised to R. for life, and on his decease to and among his children equally at the age of 21, and their heirs as tenants in common; but if only one child should live to attain such age, to him or her and his or her heirs, at his or her age of 21. And in case R. should die without issue, or such issue should die before 21, then over. At the death of the testatrix R. had not any issue: in 1787 he married, and afterwards had four children; and in Michaelmas Term, 1789, levied a fine *sur conuzance de droit*, &c. of the lands. Two of the children were born before the levying the fine. In Trinity Term, 1797, R. suffered a recovery of the lands. It was held that the children took vested remainders, and that the fine and recovery did not bar their title.

Doe d. *Roake* v. *Nowell* was argued at Serjeants' Inn, and *Doe* d. *Roake* v. *Randall*, which related to other property included in the same devise, was decided in the same manner on appeal to the House of Lords (*u*).

(*t*) 1 Maule & Sel. 327. (*u*) 5 Dow 203.

It may therefore be assumed that, on the birth of a child, the estate in fee devised to that child would immediately vest.

The event on which the limitation over is to take effect in *Gulliver* and *Wickett* is, "if such child as should happen to be born should die before the age of 21 years, leaving no issue of its body:" one of the events in *Davy* and *Burnsall* is, "being such [issue], if they should all die under 21, and without leaving issue;" and in *Woolley* and *Norwood* "leaving any such [issue] they all should die without attaining 21." It is obvious that before these events could happen the whole fee must have been disposed of and vested; the limitations over could not therefore operate as remainders; they are not estates for life which might be let in, as in *Carwardine* v. *Carwardine* (*x*); they could only take effect by determining and displacing the vested fee, even if the child should die in the lifetime of the tenant for life, the heir being incorporated with the ancestor; they are void in their creation, if not allowed to enure as executory devises; they are confined within the bounds prescribed by law; and there is no other alternative than that of admitting them as

(*x*) Ante, p. 3.

executory devises, or rejecting all those words, and thereby defeating the intention of the testators. (*y*)

The description suggested by Mr. Serjeant *Onslow* in *Woolley* and *Norwood* (*z*), seems to convey a clear and accurate idea of the limitations in question, *viz.* that they are a gift of two distinct estates to the same person.

2. Where a particular estate of freehold is first limited, capable in its own nature of supporting a remainder, followed by a limitation not immediately connected with, or commencing from the expiration of the particular estate; as the latter limitation is incapable of taking effect as a remainder, there seems to be no obstacle to its validity as a conditional limitation or springing use, if it be confined to the limits prescribed by law for estates of that description.

Thus, in the case of a limitation to the use of A. for life, and after his death and one day after, to the use of B. for life, the principles by which limitations of this kind are governed warrant the assumption, that the ulterior limitation would take effect as a future use,

(*y*) See post, c. 2. s. 1. Observations upon a case similar to *Gulliver* and *Wickett.*

(*z*) Ante, p. 17.

although it would be void in a conveyance at the common law. (*a*)

The distinction will be observed between this case, and the case proposed by *Hale* C.J. in *Weale* v. *Lower* (*b*), *viz.* a feoffment to the use of A. for life, and after the death of A. and B. to the use of C. in fee; this is a contingent remainder to C., for the ulterior limitation may, by the death of B. in the life of A., take effect at the expiration of the preceding estate.

But on a covenant by A., to stand seized, after the death of A. and his wife, to the use of a daughter in fee, although no estate was vested in the wife, and she survived A., the limitation to the daughter took effect. (*c*)

3. Conditional limitations, secondary, future, springing or shifting uses, may be distinguished into two kinds. The first sort in this distribution is, where the whole fee-simple is first disposed of, but upon some contingency that disposition is qualified, and another estate is limited to arise.

To this class the term future use, in the technical sense, does not perhaps apply.

Of this first kind the above-cited cases of *Carpenter* v. *Smith* (*d*), the Earl of *Winchelsea*

(*a*) Plow. 25. Raym. 144.
(*b*) Poll. 65.
(*c*) *Doe* d. *Dyke* v. *Whittingham*. 4 Taunt.
(*d*) Ante, p. 9.

v. *Wentworth* (*e*), and *Lloyd* v. *Carew* (*g*), are instances.

And under the same description we may, I think, rank such cases on deeds, operating under the statute of uses, as would in effect correspond with the cases of *Gulliver* and *Wickett* (*h*), *Davy* and *Burnsall* (*i*), and *Woolley* and *Norwood* (*k*); a child being born, and dying under 21, without having had any issue; where though the fee is not immediately disposed of, yet it is made defeasible after a contingent disposition of it has taken effect.

The second sort in the above-mentioned general distribution is, where, without any disposition of the immediate fee, a future estate is limited to arise, either upon a contingency, or at a period or on an event certain, unpreceded by, or not having the requisite connection with, any immediate freehold to give it effect as a remainder.

To this class the terms secondary or shifting use, or the term conditional limitation, when the estate is to arise at a period or on an certain, do not apply.

Of the first branch of this second kind, the case stated by *Holt* C. J. (*l*), of a feoffment

(*e*) Ante, p. 9.
(*g*) Ante, p. 9.
(*h*) Ante, p. 11.
(*i*) Ante, p. 13.
(*k*) Ante, p. 15.
(*l*) Ante, p. 8.

to the use of one and his heirs, to commence after the death of another without issue, if he die within twenty years ; and the above-cited case of *Woodliff* v. *Drury* (*m*), are instances.

Of the second branch of this class, the case stated by *Holt* C. J., of a feoffment to the use of another and his heirs, to commence four years from thence, is an instance.

And the cases mentioned by Lord *Hale* C. J. (*n*), and the case above proposed of a limitation to the use of A. for life, and after his death and one day after, to the use of B. for life, are examples of the third branch of this class of the general distribution.

4. In the essay on executory devises, it is shown, that a term for years, or any personal estate, may be devised or bequeathed to one for life, or otherwise, and after the decease of the devisee or legatee for life, or some other contingency or period, to another person ; and that the legal estate or interest, at least of chattels real, vests in the devisees according to their respective interests.

Similar dispositions of chattels real or personal, are usually effected by deed, by way of declaration of trust.

In *Goring* v. *Bickerstaffe* (*o*), the Lord

(*m*) Ante, p. 8.
(*n*) Ante, p. 7.
(*o*) Poll. 31. Cas. in Ch. 4.

Chancellor and the judges delivered this general opinion, "that the limitation of a term to several persons in remainder one after the other, if such persons be all in being and particularly named, can in no wise tend to the entail of a chattel, or creating of a perpetuity; but the limiting of it to a person not in being doth. And where a person hath such a trust of a possibility in the remainder of a term, limited after persons all in being, he hath good power to declare and make a disposition of the trust of such a possibility."

In *Sackvile* v. *Dobson* (*m*), a limitation of the trust of a term to husband and wife, and the longest liver of them for life, and after to the eldest issue of them, none being then born, was held to be a good limitation. It is there observed, that "the limitation to husband and wife is but one limitation, for though the trust of a term, according to the rule in *Goring* and *Bickerstaffe's* case, may be limited to divers persons that are in being, one after another, because the same is transferable, yet it cannot be good beyond two limitations to a third person not in being."

At the period when the two last-mentioned cases were decided, terms for years were gra-

(*m*) Ca. in Ch. 33.

dually acquiring such a degree of importance, in the estimation of the courts, as progressively introduced executory dispositions of property of that nature, corresponding with the limitations of estates of inheritance; and the restriction mentioned in *Sackvile* v. *Dobson* was overruled by subsequent decisions.

The case of *Oakes* v. *Chalfont* (*n*) was an assignment of a term upon trust for W. for life, then for his wife for life, then for J. for life, then for his children for their lives, and for want of such issue, or after the death of such children, for E. for life, then for his children during their lives, and for want of such issue, or after the decease of the children of E., for S. for life. W. and his wife died, and also J. and E., without issue. The Lord Keeper declared that the several trusts, as well to the child and children as to the rest, being expressly limited for life and lives, the same did not tend to a perpetuity; and therefore adjudged the remainder limited to S. a good remainder.

The case of *Higgins* v. *Dowler* (*o*) was a limitation of the trust of a term for A. for life, and after her death for H., her son, and

(*n*) Poll. 38. Ca. in Ch. 239.

(*o*) 1 P.Wms. 98. 1 Salk. 156. Fearne, 408. 518.

after his death for M., his intended wife, and after their several deceases, for the first and other sons of H. and M. successively in tail, and for default of issue mail of H. and M., then for all their daughters. The husband and wife died without having had a son, but leaving a daughter, and it was held that the limitation for the daughter was good. (*p*)

That the same doctrine extends to chattels personal, will appear by the case of *Cadogan* v. *Kennett* hereafter cited.

A lease may also be granted by deed to one for life, and after his decease to another for the residue of the term; and the intention being evident, there is no distinction between the limitation of the term, and the residue of the years.

Thus, in the case of *Wright* v. *Cartwright* (*q*), A. being seised in fee, by indenture of lease, between him and B. only, demised by deed to B. for 99 years, if she should so long live; and after her death, if she happened to die within the said term, or other end or determination of the said term, the remainder thereof to C. her son, then under age, for and during the residue of the said term; doing suit at a mill, with a penalty for every time

(*p*) And see *Massenburgh* v. *Ash*, post.

(*q*) 1 Bur. 282.

that she or B. should grind at another mill, and paying a heriot on the death of either; with a covenant or agreement that both of them should repair, and a covenant by the lessor that both should quietly enjoy. The question was, whether the term continued beyond the life of C. It was argued that *term* signified the estate, and not the time, and that the limitation over was void.

Lord *Mansfield* said, the old cases held that there could be no remainder, or substitution of a term, after an estate for life, by deed or will. It was a mere possibility. It was void from the uncertainty of commencement. There was no particular estate. The gift of a term, like any other chattel, for an hour was good for ever. The objections were subtle and artificial. When long and beneficial terms came in use, the convenience of families required that they might be settled upon a child, after the death of a parent. Such limitations were soon allowed to be created by will; and the old objections were removed, by changing the name from remainders to executory devises. The same reason required that such limitations might be created by deed; as, for instance, marriage settlements to answer the agreement of parties, and exigencies of families; therefore, to get out of

the literal authority of old cases, an ingenious distinction was invented, a remainder might be limited for the residue of the years, but not for the residue of the term. Now, in this case, upon the true construction of the lease, I am clearly of opinion that the land is demised to the son, for so many of the 99 years as should be unexpired at the death of his mother. There are many maxims of law that deeds, especially such as execute mutual agreements for valuable consideration, should be construed liberally, *ut res magis valeat*, according to the intent, which ought always to prevail, unless it be contrary to law.

And, after showing that in this lease, the word term signified the time and not the estate, he continued, limitations of terms are now of general use, their bounds are settled; the rules concerning them are certain and established; when they came to be allowed by will, or by declaration of trust, the substantial reason was the same for allowing them by deed; a strained construction should not be made to overturn the lawful intent of the parties; it was lawful to secure this lease for the benefit of the mother during her life, and afterwards by way of provision for her son. All the parties undoubtedly intended it.

The covenant here, that C. should enjoy from the death of his mother, for the residue of 99 years, is sufficiently certain, and might of itself amount to a lease.

The other judges concurred, and judgment was given in favour of the limitation over.

And a grant of chattels may be made to take effect *in futuro:* Thus (*r*) S. by deed-poll granted, after the death of his wife, goods to the plaintiff. It was contended, that by deed the use and property of goods could not be separate, albeit by will it might be good; especially this being to deprive the donor, if he survived, and to take effect but *in futuro;* but verdict was given for the plaintiff.

5. In conformity to Mr. Fearne's arrangement, some circumstances relative to the degree or quality of the property, acquired by persons taking a limited or restricted interest for life, &c., in chattels personal, under limitations of trusts, will here be noticed.

By analogy to the cases upon testamentary dispositions, a person entitled, under such trusts, to the use of household goods for life, &c., may use such goods in his own or any other person's house, alone or promiscuously

(*r*) *Tomkins v. Pooley*, 3 Keb. 683.

with other goods, or may let them out to hire. (*s*)

But if such goods be annexed as heirlooms, to go along or be enjoyed with any house, such annexation would, it appears, exclude the liberty of using or letting them to hire separately, or otherwise than with the house, on which the limitation of the goods was so attendant.

Thus, in the case of *Cadogan* v. *Kennett* (*t*), where Lord *Montfort*, upon and in consideration of marriage and a marriage-portion, settled his real estate, together with his household goods in his house (particularized in a schedule annexed to the settlement), to trustees for himself for life, remainder to his intended wife for life, remainder to the sons of the marriage in strict settlement. Lord M., after the marriage, continued in possession of the goods; after which a creditor took the goods in execution upon a judgment; and upon an action of trover, brought by the trustees under the marriage-settlement, Lord *Mansfield* observed, it was a settlement very common in great families: in wills of great estates, nothing was so frequent as devises of

(*s*) Fearne, 407. (*t*) Cowp. 432.

part of the personal estate to go as heir-looms; so in marriage-settlements, it was very common for libraries and plate to be so settled, and for chattels and leases to go along with the land. If the husband grew extravagant, there never was an idea that these could afterwards be overturned; if that court were to determine they should, the parties would resort to Chancery: it was a part of the trust that the goods should continue in the house; and for a very obvious reason, because the furniture of one house would not suit another; and it was the business of the trustees to see the goods were not removed; the creditors had no right to take the goods themselves; the possession of them belonged to the trustees, and the absolute property of them was then vested in the eldest son, and they were to be kept in the house for his benefit.

The recent case of the Earl of *Shaftesbury* and others v. *Russell* (*u*) was decided on the same principles.

But though in *Cadogan* v. *Kennett* it was held, that the possession of the goods was connected with that of the house under the trusts, yet it was admitted that Lord M. might have let them both together; for Lord *Mansfield*

(*u*) 1 Barn. and Cress. 666.

observed, that if Lord M. had let his house with the furniture, reserving one rent for the house and another for the furniture, or if the rent could be apportioned, the creditors would be entitled to the rent, though they had no right to take the goods themselves.

There having been a sale of part of the goods in this case, those which had not been sold were ordered to be delivered specifically; and a value was ordered to be put upon those which had been sold, to be paid by the creditor who had taken them in execution, and the amount to be vested in government securities upon the trusts of the settlement, the interest to be paid to the creditor during Lord M.'s life.

This, it appears by a note of the reporter, was consented to at Nisi Prius, in case the court should be with the plaintiffs on the general question. But it is apprehended that if the goods which had been disposed of, were not sold in a market overt, actions of trover and conversion might have been maintained against the purchasers, although they had no notice of the vendor's want of title, and bought for a valuable consideration; possession of such chattels not being proof of ownership.

This may be collected from the cases, in

which sales in markets overt have been pleaded and disallowed.

In an action (*x*) of trover for jewels, one pleaded the custom of Bristol, that every shop there is a market overt every day except sunday, and that the jewels were sold to him in his shop in Bristol, he being a goldsmith; and, on demurrer, the plea was held to be insufficient, because he did not aver that it was his shop in which he used to exercise the trade of a goldsmith, which he ought to have done, for if the jewels were sold in another shop, it would not toll the property of the owner.

So where (*y*), to an action of trover, the defendant pleaded the custom of London, that within the city is a market every day, for all goods to be sold in every open shop, &c., every day except sundays and holidays, &c., so as one of the contractors be a freeman; and that he, being a freeman of the company of mercers, &c., bought the wares in his own shop, wherein he used to buy such wares, &c.; on demurrer to the plea, it was held to be bad, the custom being too general, that every freeman might buy all manner of

(*x*) *Clifton* v. *Chancellor*, Moore, 624.

(*y*) *Taylor* v. *Chambers*, Cro. Jac. 68, 69.

wares in every shop, for then a scrivener might buy plate in his shop, and the like, which is not reasonable; and in this case the wares were not agreeable to the trade of the defendant.

A bill of discovery, in aid of such actions, may also be maintained (*z*).

The cases of this nature have been compared to that of a fine and non-claim, 35 Hen. 6. fol. 29., and Bacon's treatise Concerning the Use of the Law, fol. ed. 80.; and they are grounded on the maxim in 2 Inst. 714. *Caveat emptor, et spoliatus debet ante omnia restitui.*

There is a distinction between these cases, and those relative to money, or such notes as are of the nature of money, of which the property follows the possession.

In *Cadogan* v. *Kennett* there was, as Mr. *Fearne* noticed, a further ground of debate, not immediately connected with the doctrine in question; namely, Lord M's being in debt at the time of the settlement; from which it was inferred, that the settlement was fraudulent, and the continuance of possession by Lord M. a strong evidence of intention to deceive creditors. But Lord *Mansfield* ob-

(*z*) In the Earl of *Macclesfield* v. *Davis*, 3 Ves. and Bea. 18.

served, that the settlement being made (the lady being a ward of the court) under a treaty with the Court of Chancery, and approved of by the master, was a *bonâ fide* transaction; and that the possession of Lord M. was not fraudulent, because it was in pursuance and execution of the trusts: it was no contrivance to defeat creditors, but meant as a provision for the lady, if she survived, and heirlooms for the eldest son; that although such settlements were frequent, no case had been cited to show they were fraudulent.

How common (said Lord *Mansfield*) were settlements of chattels, and money in the stocks; and could there be a doubt but they were good? Yet the creditors would be entitled to the dividends during the interest of the debtor. That there was clearly no intention to defraud, and there was a good consideration; therefore he was of opinion it could not be left to the jury to find the settlement fraudulent, merely because there were creditors.

Upon this point the case of *Campion* v. *Cotton* (*a*) is an important authority. L., a stockbroker, previously to his marriage with C., with whom he had cohabited for many years, executed a settlement, by which it was

(*a*) 17 Ves. 263.

recited, that C. was possessed of certain sums in the funds, and of furniture and jewels, and that L. was seized of real estates purchased with her money; and all the stock, furniture, jewels, and real estate were settled for her separate use and absolute disposition. After the decease of L. a bill was filed by a creditor, for the purpose of defeating the settlement, on the ground of fraud, charging, that the whole of the property was purchased with money received by L. of other persons, in the course of his business, and was transferred and delivered to C., for the purpose of defrauding his creditors, and that he was at the time, with her knowledge, greatly indebted beyond what he possessed.

The Master of the Rolls, Sir *William Grant*, observed, that the counsel for the defendant, Mrs. L., insisted, that whether the stock, the furniture, and the real estate, were purchased with her money or not, the deed, in the nature of a marriage-settlement, gave her such a right to all these descriptions of property, as could not be impeached by her husband's creditors. It is clear, he said, that, supposing the whole to have been his property, he might have settled it upon the marriage. According to the cases decided at law, even the moveable effects might be so settled;

and neither the joint possession which he had of the furniture, nor the want of an inventory, would invalidate the settlement. It is clear also, that the fact of his being indebted at the time, and of her knowing him to be so, would not affect its validity. Then, he continued, assuming the falsehood of the declaration, that the property had been purchased with her money, will that circumstance prevent her acquiring, as against him, and those claiming under him, all the rights which the settlement acknowledged her to have, and professed to secure to her? I apprehend it to be clear, that the husband not only could not controvert her right to any part of the property, but was compellable to do whatever acts might be necessary to invest her with a complete title to it. He has expressly covenanted so to do; and the marriage was a sufficient consideration for the covenant. Then how is it fraudulent against the creditors? The utmost they can make of the falsehood in the deed is, that the property was in truth Mr. L.'s, though it was asserted to be her's; but if he could settle this property, and has done what bound him to give a title to it, supposing it to be his, how are they advanced by establishing that fact? All she could necessarily collect from seeing it

asserted, in the preceding declarations of trust, that the real estate had been purchased with her money, contrary to the fact, was, that he chose to take that mode of giving her those estates. I do not think it can be inferred from the evidence, that she knew he was in such circumstances, as to make his bounty to her a fraud upon any one. While it was mere bounty, she could not indeed have compelled him to complete her title by conveyance; but from the moment the consideration of marriage intervened, it became matter of obligation upon him to give her all the title he himself had; and there is no proof of any such fraud in her, as can prevent her receiving the benefit of that obligation. There is no ground, therefore, upon which the creditors can avoid the settlement, in the whole or any part.

And he held, that the additional value the land had received, by expenditures by the husband subsequent to the marriage, in building and enfranchising copyholds, could not be made a ground of charge against the wife or the estate.

It would be foreign to the purpose of the present treatise, to enter into a particular examination of the cases on post-nuptial settlements; but it may be useful to mention

the distinctions which have been adopted, and to refer to some of the leading authorities establishing those distinctions.

A settlement of the husband's real or personal estate after marriage, although he be indebted, if made for a valuable consideration and without fraud, will be supported against creditors. *Ward* v. *Shallett* (*b*), Lady *Arundell* v. *Phipps* and *Taunton*. (*c*)

In the last mentioned case, the husband, consistently with the trusts, continued in possession of the chattels, and there was no inventory.

A settlement of the husband's property after marriage, although made without consideration, and in favour of strangers, if he be not indebted at the time, and there be no fraudulent intention, will be valid against subsequent creditors. *Halloway* and others v. *Millard* and others (*d*), and *Battersbee* v. *Farrington*. (*e*)

Contrà, if he be indebted at the time; *Loeffes* v. *Lewen* (*g*), *Taylor* v. *Jones* (*h*), *Partridge* v. *Gopp* (*i*).

(*b*) 2 Ves. 16.
(*c*) 10 Ves. 139.
(*d*) 1 Mad. 414.
(*e*) 1 Swan. 106.
(*g*) Prec. in Ch. 370.
(*h*) 2 Atk. 599.
(*i*) 1 Eden, 163.

But in that case, a settlement of the wife's property would be good. *Littleton* v. *Marlow*, noticed by the Master of the Rolls in *Taylor* v. *Jones* (*k*).

These cases on voluntary post-nuptial settlements of the husband's property, with reference to the statute of 13 Eliz. c. 5., must however, be distinguished from the decisions on the bankruptcy statutes of 13 Eliz. c. 7, and 1 Jac. c. 15, with regard to such settlements made by traders; in which (except *Crisp* v. *Pratt* (*l*), and *Lilly* v. *Osborn* (*m*), where the settlements were made before the parties became traders) the courts have not been influenced by the circumstances of the party, the *bona fides* of the transaction, or any principle of moral duty. See *Tucker* v. *Cosh* (*n*), *Walker* v. *Burrows* (*o*), *Emily* v. *Grey* (*p*), *Glaister* v. *Hewer* (*q*), *Fryer* v. *Flood* (*r*).

But the fortune of a trader's wife may, before marriage, be settled in trust for the husband for life; but if he fail, then for her separate use. *Lockyer* and others v. *Savage* and others (*s*).

(*k*) 2 Atk. 602.
(*l*) Cro. Car. 549.
(*m*) 3 P. Wms. 298.
(*n*) Styles, 288.
(*o*) 1 Atk. 93.
(*p*) 3 Mer. 702.
(*q*) 8 Ves. 204.
(*r*) 1 Bro. C. C. 160.
(*s*) 2 Stra. 947.

Her stock in trade and furniture may also be vested in trustees, to enable her to carry on business separately from her husband; and the effects, though of a fluctuating nature, or property purchased by her with the profits, if he do not intermeddle, and there be no fraud, will not be liable to his debts. *Hasclington* and another v. *Gill* and another (*t*), *Jarman* v. *Woolloton* and another (*u*).

In *Cadogan* v. *Kennett* (*x*), Lord *Mansfield* observed, that the household goods in question were specifically enumerated in a schedule annexed to the settlement, so as to avoid any fraud by the addition or purchase of new; but in Lady *Arundell* v. *Phipps* and *Taunton* (*y*), *Jarman* v. *Woolloton* and another (*z*), and *Campion* v. *Cotton* (*a*), the want of a schedule was not held to invalidate the settlements.

Under such settlements of personal chattels as are the subject of our consideration, the legal right to the possession of the chattels is vested in the trustees, and consequently, they have a legal remedy for the recovery thereof; and the *cestui que* trust may, as in other cases, apply for relief to the jurisdiction of the Court of Chancery; Lady

(*t*) 3 T. R. 620.
(*u*) 3 T. R. 618.
(*x*) Ante, p. 34.
(*y*) Ante, p. 43.
(*z*) Ub. sup.
(*a*) Ante, p. 39.

Arundell v. *Phipps* and *Taunton* (*b*); and that court will decree the restitution of the property; in the Earl of *Macclesfield* v. *Davis* (*c*); or will, on the application of any person interested, however remotely, compel the trustees to assert their legal right; in *Foley* v *Burnell* (*d*).

The tenant for life of chattels personal, whether the interest be acquired under a will or settlement, cannot pawn them, so as to bind those entitled to the ulterior executory interests therein. See the case of *Hoare* v. *Parker* (*e*), cited by Mr. Fearne, and the Earl of *Macclesfield* v. *Davis* (*g*).

Indeed the principle on which it has been held that goods pawned by a factor (*h*), or a person obtaining them under false pretences (*i*), or one with whom they have been deposited (*k*), may be recovered by the true owner, seems equally applicable to these cases. And the custom of London, as to sales in market overt, does not extend to pawning.

(*b*) Ub. sup.
(*c*) 3 Ves. and Bea. 18.
(*d*) 1 Bro. C. C. 277.
(*e*) 2 T. R. 376.
(*g*) Ub. sup.
(*h*) *Marsden* v. *Panshall*, 1 Vern. 407.
(*i*) *Parker* v. *Patrick*. 5 T. R. 175.
(*k*) *Hartop* v. *Hoare*, 3 Atk. 43.

CHAP. II.

GENERAL QUALITIES OF SPRINGING USES AND OTHER LIMITATIONS CORRESPONDING WITH EXECUTORY DEVISES.

1. The distinctions in the creation of contingent remainders, and the future uses under consideration are, that the former may be limited in conveyances at common law; the latter only in conveyances which derive their effect under the statute of uses: the former require a freehold to precede and support them, and must vest, at furthest, at the instant the preceding estate determines; the latter require no preceding estate to support them, and if there be any preceding estate, it is not necessary that the future uses should vest when such preceding estate determines: and contingent remainders relate only to lands, tenements, and hereditaments, real or mixed; but the principle of such future uses applies to personal estate as well as real.

The great and important difference, between the nature or quality of contingent remainders and these future uses, when they are respectively created (and that, indeed, which renders it material to distinguish the one from the other in their creation), consists in this; that the former may be barred and destroyed, or prevented from taking effect, by several different means, but the latter cannot be prevented or destroyed, by any alteration whatsoever in the estate out of which, or after which they are limited.

Thus, in *Lloyd* v. *Carew* (*a*), where A. and B., two sisters, upon the intended marriage of B. and C., in consideration of 4000*l.* paid to A. by C., conveyed lands by lease and release to trustees and their heirs, to the use of B. and C. for their respective lives, remainder to the first and other sons in tail male successively, remainder to the daughters of B. and C. in tail, remainder to the heirs of C. Provided that if there should be no issue of B. and C. living at the decease of the survivor of them, and the heirs of B. should, within twelve months after the decease of the survivor of B. and C., dying without issue as aforesaid, pay to the heirs or assigns of C. 4000*l.*, then the

(*a*) Prec. in Chan. 72. Show. Ca. in Parl. 137.

remainder in fee so limited to C. should cease, and the lands should remain to the right heirs of B. for ever. Afterwards, B. and C., for extinguishing all right and title of B. and her heirs under this proviso, levied a fine of the lands to the use of C. and his heirs; B. and C. died without issue, and the heir of B. filed a bill against the heir of C., to have a conveyance of the lands upon payment of the 4,000*l.* pursuant to the proviso. The bill was dismissed; but upon an appeal to the House of Lords, the decree of dismission was reversed.

In this case, the new use to the heir of B., was not a limitation which could unite with the limitation to the ancestor, under the rule in *Shelly*'s case, that rule not being applicable to conditional limitations, but to remainders only; the estate vested in B.'s heir by purchase, therefore B. herself could not have the benefit of the proviso, and her fine would not operate by way of estoppel.

Mr. Fearne, in noticing the case of *Pells* v. *Brown*(*b*), with reference to executory devises, observes, that it is said in that case, if the person to whom the executory devise is limited come in as vouchee, in a common recovery, his possibility is thereby given up. Mr. Powell,

(*b*) Cro. J. 590.

in the fourth edition of the Essay (*c*), enters particularly into the consideration of this question, and concludes that, by this mode, executory interests may be effectually parted with. The learned author of a modern Treatise on Recoveries (*d*) states, that "a recovery suffered by a person who has a contingent or executory interest *in tail*, either under a contingent remainder or executory devise (*e*), will not bar the intail or remainder by way of conveyance; where suffered by a person who has an executory interest *in fee* it will, by way of release or estoppel, bar his interest and conclude his heirs. The estoppel will bind the person by whom the recovery was suffered, though he had an interest in tail. And it well deserves consideration, whether the effect of a recovery, by a person who has a contingent or executory interest *in tail*, is not, by estoppel, to preclude the intail from ever giving a vested estate. This point depends on first principles. No decision on the point has occurred; the decision in the case of *Nicholas Moore* (*g*) bears, in some degree, on the point."

(*c*) Vol. ii. p. 69.

(*d*) Preston on Conveyancing, vol. i. p. 6.

(*e*) Pigot on Recoveries, 133.

(*g*) Palm. 365.

Executory estates are not divested by a feoffment.

Thus (*h*), where one by deed granted several annuities to his younger children, and afterwards devised all his lands to his eldest son and his heirs, upon condition that he paid the annuities, and if he failed of payment that the youngest son should enter and have them; the eldest son entered and made a feoffment to A., and then the youngest son entered for non-payment; and held that his entry was lawful, and that the contingent estate was not divested.

A question, founded on principles somewhat analogous, has lately been raised (*i*), with respect to an executory devise, which is equally applicable to these future uses, *viz.*, whether, where there is a devise in fee, with an executory devise over, the limitation over may be barred by a fine, levied by the tenant in fee before the time at which the executory devise is to take effect, and non-claim for five years after the right of entry, under the executory devise, accrues. It was urged, that the operation of a fine applies only to estates

(*h*) *Mullineux*'s case, Trin. 42 Eliz., cited Palmer 136; and see *Smith* v. *Warren*, Cro. Eliz. 688.

(*i*) *Romilly*, Knight v. *James*, 6 Taun. 263.

which are displaced when the fine is levied, and this executory devise was not displaced by the fine. It was admitted that there was no express decision of this point, but the *dicta* of judges in favour of that opinion were cited.

Lord *Hale*, in *Focus* v. *Salisbury* (*k*), says, a fine with five years' non-claim, must bar an estate precedent to the fine, not subsequent to it. And in *Thomasin* v. *Mackworth* (*l*), after noticing a case where a lease for years being in *esse*, another lease for years was made, to begin after the end of the first lease; the first lease determined, the second lessee did not enter, but he in reversion entered, and made a feoffment, and levied a fine with proclamations, and five years passed without entry or claim, and it was resolved that the lessee for years was barred. *Bridgman* C. J. observed, that if the first lessee had been ousted, and the disseisor levied a fine, and he that had the future interest enters not within five years, it shall not bar, for the disseisor's fine did not divest the future interest; and he added, that fine and non-claim shall not bar an estate which is not turned to a right.

In the case proposed by *Bridgman*, the second lessee would only have an *interesse*

(*k*) Hardr. 400. (*l*) Carter, 82.

termini, which would not give him a right of possession, therefore he could not be dispossessed.

In the principal case it was not necessary to decide the point; but we may further observe, that the doctrine contended for, is consistent with that which is laid down by the author of the Touchstone (*m*), that "such as have neither present nor future right at the time of the levying of the fine, by reason of any matter before the fine, but whose right groweth either entirely after, or partly before and partly after the fine, are not barred at all by the fine, but they may make their claim, &c. when they will." In elucidation of which doctrine it is said (*n*), that "if a father die seised of land, his elder son being professed, and the younger son entereth and is disseised, and a fine with proclamations is levied by the disseisor, and then the elder son is de-arraigned, in this case it seems he is bound to no time."

The learned editor of that work (*o*) contends, that on principle the heir would be barred, unless the fine were avoided by entry, &c., within five years after the de-arraignment. He observes, however (*p*), that if a man

(*m*) Shep. Touch. 22.
(*n*) P. 34.
(*o*) Mr. Preston's edit. p. 34.
(*p*) P. 22.

has a fee, subject to an executory devise, or springing or shifting use, or a base or determinable fee, his fine with proclamations never could become a bar to the title afterwards arising under this executory devise, &c.

In a case which arose a few years ago, similar to *Gulliver* and *Wickett* (*q*), it was contended (*r*), by gentlemen whose opinions are entitled to a very high degree of respect, that such cases are exceptions to the general rule, that an executory devise cannot be destroyed, by any alteration in the estate after which it is limited. Under a devise, as to the point in question, to M. for life, remainder to the children of M. that he should leave, or have living at the time of his decease, and their heirs, as tenants in common; and in default of a child or children of M., or, being such, all of them should die under 21, then to J., W. and H., and their heirs as tenants in common; it was held, in the opinions to which I have referred, that by the feoffment of the tenant for life, the contingent remainder to his children, and the contingent remainder to J., W. and H. were destroyed; and that the limitation in favour of J., W. and H. was also defeated, as far as it was to operate by executory devise.

(*q*) Ante, p. 11. (*r*) M. S. Opinions.

The author, with great diffidence, ventures to suggest a doubt upon the accuracy of doctrine, which is sanctioned by such distinguished authority.

It is clear that the feoffment would destroy, as well the contingent remainder to the children, as that to J., W. and H., and the only question is, whether it would defeat the limitation to J., W. and H., so far as it was to take effect as an executory devise, that is, in the event of children surviving the tenant for life, and afterwards dying under 21.

The opinions appear to be founded on the assumption, that a limitation which was to take effect in defeasance of an estate after it had vested, could not take effect if such estate never did vest.

There is not, it is apprehended, any express authority on this point; it must therefore be governed by the general principles of executory devises and by analogous cases.

The principles on which it is held, that by the feoffment of a tenant for life, contingent remainders are destroyed, are not in any degree applicable to executory devises; that is the doctrine of the common law, founded on feodal principles; the effect of the feoffment is to determine the estate for life, and the rule was established to prevent the incon-

venience of there being no tenant to the freehold, to do services to the lord, or answer the præcipe of a stranger. Executory devises would have been void at the common law; they were originally admitted under the statute of uses, and, in the modification of them, the courts, being emancipated from the rigid rules of the common law, have annexed such restrictions only, as appeared calculated to render them of the greatest general utility.

The courts are bound so to construe wills as to effect the declared intention, if that intention be not inconsistent with the rules of law. In the case which we are considering, the intention is declared to be, that, after the death of M., the land should go to the children of M., living at his decease in fee; but the particular estate being destroyed before that contingent remainder could vest, the courts are restrained by the rule of law from giving effect to that limitation: the intention is also declared to be, that if there should be such children, and they should all die under 21, the land should go to J., W. and H.; if that limitation be not inconsistent with any rule of law, the courts are bound to carry it into effect; and it is apprehended that that there is no rule of law, which compels the courts to adopt such a construction, with

regard to the latter limitation, as will defeat the testator's intention.

And although this question may not have been decided on any case precisely similar, one of the points determined in *Avelyn* v. *Ward*(*s*), and the observations of Lord *Hardwicke*, are so apposite as perhaps to amount to an authority.

That case was a devise by A. of his real estate, to his brother B. and his heirs, on condition that, within three months after the testator's death, B. should give a release; but if B. should neglect to give such release, he devised to R. and his heirs; B., who was heir-at-law of the testator, died in his life-time. The Lord Chancellor said, he knew no case of a remainder, or conditional limitation over of a real estate, whether by way of a particular estate, so as to leave a proper remainder, or to defeat an absolute fee before, by a conditional limitation, but if the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes place.

And, after showing that the devise over was not to be considered a condition, but a conditional limitation, he said, as it was a conditional limitation, it came to the question, whether it was necessary every particular fact

(*s*) 1 Ves. 420.

should take place? or whether it was not to be construed according to the sense and intention of the testator, that if, in any event, the first could not take place, the subsequent should? if so, the substance of this was the intent of the testator, that if no such release was executed, whereby the demand against his estate would exist, the estate should go over. He held that there was no distinction between the case of a remainder over, after an executory particular estate only, and those cases wherein an executory devise was introduced, after a disposition of the whole fee; and he decreed that the devise over should take place.

Upon principle, therefore, as well as authority, so far as the case of *Avelyn* v. *Ward*, and others of the same class, can be considered authority, there seems to be strong ground for contending that, in the case in question, if the event on which the executory devise was limited to take effect had happened, that limitation would not have been defeated by the feoffment of the tenant for life; and this construction would avoid the anomaly which a contrary decision would involve, with regard to the rule now under consideration.

Whether these future uses are liable to be destroyed, or affected, by any act of the person, out of whose seisin they are to arise, is a question which has been so ably discussed by Mr. Fearne (*u*), and the author of the excellent Treatise on Powers (*v*), that it is not thought necessary, in this place, to enter into a particular consideration of the point. On a careful perusal of the cases upon the subject, and the observations to which I have referred, it will, I think, satisfactorily appear, that the judgments in those cases did not decide the point in question; and there seems strong ground for the assumption, that at this time, the courts would not admit the artificial doctrine of *scintilla juris*, unless they were expressly bound by authority. If, as it is generally admitted, although there may be contingent remainders or future uses, the whole seisin be divested out of the feoffees, and executed in and exhausted by the *cestuis que* use *in esse*, to whom the fee is limited or results, is it not the most rational construction to hold, that it is the property and quality of the estate so executed, to be subject to let in, or be defeated by, the contingent remainders or fu-

(*u*) Fearne's Essay, p. 290. (*v*) Sugden on Powers, p. 12.

ture uses when they arise, and that such contingent remainders or future uses take effect out of the original seisin of the feoffees?

This construction appears to be strictly in conformity, as well to the language as the spirit of the Statute of Uses, and by it all the inconveniences of the doctrine of *scintilla juris*, which are pointed out in the treatise referred to, would be avoided.

In the Essay on Executory Devises, a distinction is here noticed, between the cases of the first limitation being in fee, and being only in tail, in regard to the effect of the ulterior contingent devise. In the first case it is shown, that the limitation over upon a dying without issue living A., is good as an executory devise; because the whole fee being, in the case there cited, first limited to a person *in esse*, there was no considering the subsequent limitation as a remainder. But it is observed, that if the first limitation had been in tail only, then the subsequent devise might have been considered as a contingent remainder, depending on that estate tail; and as limited to take effect, only in case that estate tail determined in the life of A.; that is, in case the first devisee in tail died without issue in A's lifetime.

In the case of *Spalding* v. *Spalding* (*w*), referred to in support of that proposition, the court held the subsequent devise to be a contingent remainder, in order to fulfil the intent of the testator, as collected from the context of the will; to have construed the subsequent devise an executory devise, would have deprived the objects of the testator's bounty of the provision intended to be made for them.

This principle governed the case of *Kentish* v. *Newman* (*x*). By articles before marriage it was agreed, that the wife's portion should be laid out in land, to be settled on the husband and wife for their lives, remainder to the heirs of their bodies; and if not laid out in land during their joint lives, the money to be to the sole use of the wife, if living, but if she should die before her husband, then to go to her brother and sister. The wife died first, leaving issue of the marriage a daughter; and the question was, whether the money, which was not laid out in land, should go to the daughter or to the wife's brother and sister. It was decreed that the daughter should have it, for that the intention of the articles was, to provide for the wife and the issue of the marriage. That it could not be intended that the

(*w*) Cro. Car. 185. (*x*) 1 P. Wms. 234.

wife ever thought of preferring her brother and sister before her own child; and though the words were, if the wife should die, leaving the husband, then the money to go to the wife's brother and sister, yet must they be construed to mean, if the wife should die without issue.

The courts, therefore, in these cases, supplied the words, " without issue," in order to effectuate the apparent intent, the issue in tail being the primary objects of provision.

III. It seems scarcely necessary to state, that executory limitations of chattels, when made by way of trust, are equally secure as such limitations of real estates, against the disposition of the person entitled to the preceding or limited interests therein.

And that, by analogy to executory devises, the same doctrine applies to such limitations of chattels real, when made without the intervention of trustees, may be assumed upon the the reasoning and observations of Lord *Mansfield*, in *Wright* v. *Cartwright* (*y*).

And that it also applies to executory dispositions of personal chattels, is evinced by the above noticed case of *Cadogan* v. *Kennett* (*z*), and the observations and authori-

(*y*) Ante, p. 30. (*z*) Ante, p. 34.

ties, mentioned in a preceding page of this treatise. (*a*)

IV. And the union of a term with the inheritance, by a surrender to, or any act done by a person having notice of the trust, will not, in equity, be allowed to defeat the executory limitations.

Thus in the Duke of *Norfolk's* case hereafter cited, the trustee, after the death of the eldest son without issue, merged the term of 200 years by a surrender to the second son, who was seised of the reversion. Lord *Nottingham*, in reference to that circumstance observed, "this point is not worth speaking to, for whether the law be so or not, it is not material, because the trust of the term, if well limited unto Charles, whatsoever hath been done to break in upon this trust and to defeat it, by them who had notice of the trust, and were privy to it, though it be never so good in law, yet it ought to be set aside in equity; and in this we all agree in opinion."

V. And though, in general, these future uses cannot be barred by the first taker, yet where, in lands of inheritance, an estate tail is first limited, and then a conditional limitation is made upon that estate, a recovery suffered

(*a*) Ante, p. 46.

by the tenant in tail, before the event or condition happens on which the ulterior use was to arise, will bar the estate depending on that event or condition.

In the case of *Benson* v. *Hodson* (*b*), M. covenanted to levy a fine of lands, to the use of himself and the heirs male of his body, remainder in tail to several others, remainder to his own right heirs. Provided that, if there should be a failure of issue male of his body, and E. be dead, and A. be married or of the age of 21 years, then A. should have 200l. per annum for ten years. M. died, leaving issue a son, who made a lease for 1000 years, then levied a fine and suffered a recovery, and died without issue male, E. being dead, and A. being married and of age. It was held that the rent was barred by the common recovery.

The estate tail was subsisting when the recovery was suffered, and the rent was not to arise until the determination of that estate.

The case itself is not an authority for the position in question, because the limitation of the rent being to take effect, not in abridgment, but at the regular determination of the estate tail, was in the nature of a contingent remainder, similar to the limitation in-

(*b*) 1 Mod. 108.

troduced by the proviso in the above-noticed case of *Carwardine* v. *Carwardine* (*c*); but, in giving judgment, *Hale* C. J. said, "a man made a gift in tail, determinable upon his nonpayment of a thousand pounds, the remainder over in tail to B., with other remainders; the tenant in tail, before the day of payment of the thousand pounds, suffered a common recovery, and doth not pay the thousand pounds; yet, because he was tenant in tail when he suffered the recovery, by that he had barred all, and had an estate in fee by that recovery." Also, "if there be tenant in tail reserving rent, a common recovery will not bar it: so, if a condition be for payment of rent it will not bar it; but if a condition be for doing a collateral thing it is a bar; and so, if tenant in tail be with a limitation so long as such a tree shall stand, a common recovery will bar that limitation."

VI. This privilege of conditional limitations and future springing uses, which exempts them from being barred or destroyed, except by a tenant in tail, is the foundation of an invariable rule, with respect to the contingency upon which an estate of this sort is permitted to take effect; which is, that such

(*c*) Ante, p. 3.

contingency must happen within a short space of time; such as a life in being, or some few years after; a rule which was adopted, in order to prevent property being rendered unalienable during an inconvenient period.

In *Davies* v. *Speed* (*e*), where husband and wife levied a fine of the wife's land, to the use of the heirs of the body of the husband on the wife begotten, and for default of such issue to the use of the right heirs of the husband; they had issue which died, then the wife died, and then the husband died. The land being the wife's, no estate could result or arise by implication to the husband for life; and the issue and wife dying in the lifetime of the husband, and, consequently, before the limitation to his heirs could vest, that contingent limitation failed for want of a preceding freehold to support it; and (which is the point material to the present purpose) it was said, that as a springing use it was void, being to arise after a dying without issue, a remote possibility which the law will not allow. (*g*)

But *Holt* C. J. observed, "a feoffment to the use of another and his heirs, to commence four years from thence, is good as a springing

(*e*) 2 Salk. 675. Holt, 750. Shaw, Cas. Parl. 104.

(*g*) But see post, c. 4. s. 6 and 7.

use; and the whole estate remains in the feoffor in the mean time; so it is if it were to commence after the death of another without issue, if he die within twenty years."

In *Harwell* v. *Lucas* (*h*), one made a feoffment to the use of the feoffees and their heirs, upon condition that if he did not pay 10,000*l.* within fifteen days to B. or his assigns, then they should stand seised to the use of B. and his wife, remainder to T. their second son in tail, with several remainders over: the money was not paid, and it was held that this springing use was valid.

And so in *Bostock*'s case (*i*), a fine was levied of land to the use of A. for life, remainder to the use of the heirs male of A. on the body of B. begotten, with other remainders over; and if the said A. should die, living the said B., that then the said fine should be of the said land to the use of the said B. for the term of her life, and after her decease to the uses aforesaid. A. had issue male and died, living B., and it was resolved that B. was entitled to an estate for life in the land.

And in *Carpenter* v. *Smith* (*k*), land was limited by deed and fine to J. in fee; and if

(*h*) Moore's Rep. 99.
(*i*) Ley, 54.
(*k*) Poll. 70.

J. die, living W., then to the heir of W.; J. died in the lifetime of W., and the court was of opinion that the limitation over was good.

Mr. *Fearne* observes, that in respect to estates of freehold, by the time of vesting is meant the time of vesting of the freehold; for although land should be limited for a term of 200 years or upwards, with remainder to an unborn son of a person then living, this executory devise to such unborn son would be good; because the vesting of the freehold is confined to the period of a life then in being; for, upon the birth of such son, the freehold will vest in him, or, upon the death of such person without any son, it must vest somewhere else (only subject in either case to the preceding term).

And in support of this doctrine the case of *Gore* v. *Gore* (*l*) is referred to; where A. devised his lands to trustees for 500 years upon trusts, and after the determination of that term to the first son, &c., of B. (who had no son born at the testator's death), and this executory devise to the unborn son of B. was held good; because it was clear the freehold must vest, either on the birth of such son, or on B.'s death without having had any son.

(*l*) 2 P. W. 28.

Some decisions upon deeds appear to have created a doubt, whether upon this point the analogy between executory devises and springing uses exists.

Thus, in *Adams* v. *Savage* (*m*), determined in 1701, A., by lease and release, conveyed lands to trustees and their heirs, to the use of himself for 99 years, if he should so long live, remainder to the use of the trustees for 25 years, remainder to the heirs male of his own body, remainder to his own right heirs. The question was, whether A. was tenant in tail or only tenant for years; and the court held the limitation to the heirs male of the body of A. to be void, because there was no preceding estate of freehold limited to support it; and that it should not be implied contrary to the intent of the conveyance.

And in *Rawley* v. *Holland* (*n*), determined in 1712, A., on his marriage, conveyed lands to trustees and their heirs, to the use of himself for 99 years, if he should so long live, and after to the trustees for 200 years, remainder to the heirs male of his own body, remainder to his right heirs. Upon a case

(*m*) 2 Salk. 679. Lord Raym. 854.

(*n*) 22 Vin. 189. pl. 11. 2 Eq. Ca. Ab. 753.

referred from the Court of Chancery to the judges of the Court of Common Pleas, they held the limitation to the heirs male of the body of A. void, no freehold being limited to any person precedent to that estate; and that no freehold could result to A. for his life by implication, because another estate, *viz.*, for 99 years, if &c., was expressly limited to him, which would be inconsistent with a freehold by implication; and that a freehold, either expressed or implied, was necessary to support such limitation.

The case of *Adams* v. *Savage* did not, in fact, involve the point in question; for A. would not have been tenant in tail, but for years only, if the limitation to the heirs male of his body had been admitted effectual as a future use. And neither in that case, nor in *Rawley* v. *Holland* did the court advert to the doctrine of springing uses; they held the limitations to the heirs male of the bodies of the respective grantors to be void as remainders.

There seems but little reason to doubt that such limitations would now be supported as springing uses; they have all the requisite qualities of a valid springing use; they derive their effect from the Statute of Uses;

they cannot operate as remainders; and they must take effect, if at any time, at the expiration of a life in being.

The case of *Goodtitle* d. *Weston* v. *Burtonshaw* (*o*) may, without due consideration, appear to militate against the application of this rule to springing uses.

N., by lease and release, conveyed lands to trustees and their heirs, to the use of himself for 99 years, if he should so long live; and from and after the decease of the said N., to trustees and their heirs during his life, to preserve contingent remainders, with remainders over. One of the points argued was, that all the contingent uses in the settlement were void, as there was no freehold to support them, the first use of N. being for 99 years, which is but a chattel; and the interest of the trustees not being to commence till after his death. That was attempted to be answered on the foot of a resulting use in N., the settlor for life; but the court was of opinion there could be no resulting use in the settlor in this case. It was then argued that a sufficient estate passed to the trustees to support the contingent limitations; and the court was of that opinion, holding that, in the clause

(*o*) Appendix to Fearne, 570.

introducing the remainder to the trustees, the words, " after the decease of the said N.," might be rejected as repugnant; or the words, " or other sooner determination of the term," might be implied.

Lord *Mansfield*, in delivering the opinion of the court, is represented to have observed, that this being by way of *feoffees* to uses, no such thing as a springing use could arise in the *trustees* to support the subsequent estates, analogous to executory devises. There appears to be some inaccuracy in the language attributed to his lordship, for it does not very explicitly convey his meaning; the negative, however, seems to imply an affirmative, that, if the limitation to the trustees could have taken effect by the Statute of Uses, a springing use might have arisen in them, analogous to executory devises, in case it had been necessary to resort to that doctrine.

A springing use may be limited to take effect within the compass of several lives in being; for whatever may be the number of such lives, the whole period can amount to no more than the life of the survivor of them.

In *Doe* d. *Dyke* v. *Whittingham* (*p*), B., in consideration of love and affection, gave and

(*p*) 4 Taun. 20.

granted to his daughter M., her heirs, &c., (after the deceases of himself and his then wife,) certain freehold hereditaments, to hold the same (from and after the decease of him and his then wife) absolutely. The court held that the instrument operated as a covenant to stand seised, and that the future use was good.

And the above-mentioned cases of the *Earl of Winchelsea* v. *Wentworth* (*q*), and *Lloyd* v. *Carew* (*r*), show that a springing use, to vest within a short time after a life in being, is good.

I have not been able to discover any case, expressly defining the utmost limits allowed for springing uses. Lord *Holt*'s observation in *Davies* v. *Speed* (*s*) extends the period to 20 years. (*t*)

An estate tail may, by law, be unalienable during the period of gestation and minority; and that consideration furnished the standard for the boundary within which executory devises were admitted; no greater inconvenience, or tendency to a perpetuity, is produced by this fetter upon alienation, than by the policy of the law might otherwise exist; and

(*q*) Ante, p. 9.
(*r*) Ante, p. 9.
(*s*) Sup. p. 67.
(*t*) And see *Massenburgh* v. *Ash*, post.

it is immaterial, with regard to the interest of the public in the property, whether the suspension arise from the law or the act of the party. These are the principles on which the limits of executory devises were established, and it is obvious that the same principles apply, with equal force, to the executory limitations which are the subject of our enquiries; for it can make no difference, with regard to the influence upon the property affected by them, under what instrument such secondary limitations arise; no inconvenience, or tendency to a perpetuity, can result from suspending alienation by a springing use, which would not also be produced from such suspension by executory devise.

But this rule does not apply to springing uses upon or after an estate tail; the tenant in tail may, as we have seen (*u*), bar those uses by common recovery; in such a case, therefore, the alienation of the property is not restrained.

The common limitations in settlements, for shifting the settled estate from one branch of the family, tenants in tail, to a different branch, upon the accession of another estate, or on the refusal or neglect to take the sett-

(*u*) Ante, p. 63 & seq.

lor's name and bear his arms, and the powers of leasing, sale, and exchange usually inserted, are therefore valid, although such limitations or powers possibly may not take effect or be exercised until a remote period.

That the rule in question applies to chattels appears by the case of *Massenburgh* v. *Ash* (*v*), which was a settlement of a term on marriage, in trust for the husband and wife during their lives and the life of the survivor; and if there should be issue male of the marriage living at the decease of such survivor, then in trust that the eldest son should be maintained out of the rents and profits until 21, and then the term to be assigned to him; and in case he should die before 21, then in like manner for the other sons successively; but if there should be no such issue living at the decease of the survivor of the husband and wife, or being such they should all die under 21, then to W. M. The husband and wife died, leaving an only son, who died under 21. The question was, whether the trust for W. M. was good. The Lord Keeper, observing that he took the rules in Chancery, touching the limitations of trusts of terms of years, to be the same with executory devises of terms for

(*v*) 1 Vern. 234. 304.

years at law, directed a case for the opinion of the judges of the Common Pleas; and the judges being unanimously of opinion that the contingent limitation to W. M. was good, the Lord Keeper decreed for him.

The period now fixed as the boundary for executory devises, and, consequently, for these future uses, is, during the lives of persons in being, and the life of the survivor of them, and 21 years after the survivor's decease, and a further number of months, equal to the duration of pregnancy. And it has been held, that an executory devise may be limited, to take effect at the end of an absolute term of 21 years after a life in being at the death of the testator, without reference to the infancy of the person intended to take. (*w*)

The act of 40th G. 3. c. 98. "for restraining all trusts and directions in deeds or wills, whereby the profits or produce of real or personal estates shall be accumulated, and the beneficial enjoyment thereof postponed beyond the time therein limited," is explained in a note by Mr. *Preston* to Mr. *Fearne*'s essay. (*x*)

(*w*) Fearne, 433. n. (*l.*) 7 ed. (*x*) P. 538.

CHAPTER III.

OF SPRINGING USES AND OTHER LIMITATIONS, UPON A FAILURE OF HEIRS OR ISSUE.

I. WHENEVER a future use is limited to take effect after a dying without heirs or without issue, subject to no other restriction, the limitation is void; for the policy of our law will not suffer property to be tied up, and rendered unalienable, in expectation of such remote contingencies.

In legal construction dying without issue means an indefinite failure of issue; for in a *formedon* in reverter or remainder, although the first donee had many issues in lineal descent inheritable to the estate tail, and who held the estate, the demandant need not name any of the issues in the clause, *et quae post mortem*, &c., but shall say, *et quae post mortem* of the donee, *ad ipsum reverti*, or *remanere debet*, *eo quod* the donee died without issue. (*a*)

(*a*) 8 Co. 88. a. *Buckmere's* case.

In *Coltman* v. *Senhouse* (*b*), H. covenanted that if he should die without issue of his body, then he the said H. did give, grant, release, and confirm the lands in question to E. his mother, and her heirs. H. died without issue; and it was adjudged that no estate passed from the son to the mother by this deed, which clearly might have operated as a covenant to stand seised. The judgment was affirmed in error.

Where, however, an estate tail is subsisting, and the reversioner limits an estate to take effect on failure of issue of the tenant in tail, that is, at the regular expiration of the subsisting estate, such limitation is not a future use, but is an immediate disposition of the reversion, and is valid by the common law.

Thus, in *Milborne* v. *Dashburne* (*c*), a grant of the reversion, when it should happen after the death of the tenant for life, was construed a good grant of the then present reversion, notwithstanding the words seemed to be otherwise, and sound futurely.

In *Weal* and *Lower* (*d*), A. made a feoffment to the use of himself for life, and after the death of A., and M. his wife, to the use

(*b*) Poll. 523.
(*c*) Cro. Eliz. 324.
(*d*) Poll. 57.

of B., &c.: it appeared that M., by a former deed, had an estate for life. *Hale* C. J. held, that the mentioning the death of M. was only expressing when B. should take the profits in possession, and that the deed was a conveyance of the then subsisting reversion or remainder, expectant on the death of M.

But if the use be limited to take effect in default, or on failure of issue not inheritable to the subsisting estate; as, if that estate be in tail male, and the future use be limited to arise on failure of issue generally of the tenant in tail male, that limitation, as it may not take effect till several generations after the determination of the preceding estate, is too remote and void.

In two modern cases of this latter description, which arose on wills (*e*), the courts, collecting the intention of the testators from the context and general tenor of the wills, restrained the meaning of more general expressions to failure of such issue as were inheritable to the preceding estates. And it is apprehended that the same construction would be adopted, with regard to a limitation by deed, apparently too remote, if the intention

(*e*) *Jones* v. *Morgan*, 3 Bro. Parl. Ca. 323., Appx. to 4 Bro. Ch. Ca. 441. Fearne, 577, and *Lytton* v. *Lytton*,

to conform to the rule of law were sufficiently manifested; for in the Marquis of *Cholmondely* v. Lord *Clinton* (*g*), the Master of the Rolls, after a minute investigation of the cases, observed, "I conclude, from these authorities (to which many more of similar import might have been added), that the law on this subject is completely settled, and the rules of construction, both of deeds and wills, established in a way not to be shaken; that though there is always a strong presumption in favour of technical meaning and inference, yet it is no more than a presumption; that it is not necessarily and universally binding and conclusive, but subject to be controled by the manifestation of a contrary intent: that the primary object of enquiry is the intention of the party; and where that is, on the face of the instrument, clearly and satisfactorily ascertained, and found not to be contrary to any rule of law, the court is bound, if the words will admit of a construction conformable to the intention, to adopt that construction, however contrary it may be to technical meaning and inference."

Another point connected with the rule in question, arose upon the cases of *Moore* v.

(*g*) 2 Jac. and Walk. 101.

Parker (*h*) and *Goodman* v. *Goodright* (*i*), mentioned by Mr. Fearne, *viz.*, whether, if a reversioner limit a contingent use in tail, to arise at the regular expiration of the subsisting estate, with remainder in tail, and the estate tail should not take effect, the remainder can take effect as a substituted estate.

Some observations applicable to the point will be found in a subsequent page of this treatise. (*k*)

II. The like rule holds in the limitation of a term or personal estate, *viz.*, that a disposition thereof to take effect after failure of heirs of the body, or dying without issue, without other restriction, is too remote.

Mr. Fearne mentions the case of *Pearse* v. *Reeve* (*l*), where there was a limitation of a term (by deed) in trust for R. during his life, then in trust for his wife during her life, and after their deaths in trust for their children during their lives; and if R. and his wife should die within the term without issue, or, having issue, if that issue die within the term, then to W.; this limitation to W. was held void. And he observes that there is a long

(*h*) Lord Raym. 37, 4 Mod. 316, Skinner 558.
(*i*) 2 Burr. 873.
(*k*) Post, c. 4, s. 7.
(*l*) Poll. 29.

series of cases to this purpose reported by Pollexfen, from p. 24 to 44. To these the case of *Warman* v. *Seaman*, p. 112 of the same book, may be added.

And in *Kirsley* v. *Duck* (*m*), a man possessed of land for a term of 2000 years, granted the land to K. for life, and to the heirs of his body; and in default of issue to D. for 1800 years; the limitation to D. was adjudged void; for it would create a perpetuity not to be barred by any common recovery.

In *Mainwaring* v. *Baxter* (*n*) lands were conveyed to trustees in fee, in trust for C. for life, remainder to the trustees for 1000 years, remainder to H. for 99 years, if he should so long live, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, with other remainders over. And it was declared that the term of 1000 years was so limited, to the intent and purpose that all and every the person and persons (other than the said C.) on or to whom any estate or interest in the said premises was thereby before settled or intended, might be content to accept the same in such manner as the same was in and by the said indenture before limited and appointed;

(*m*) 2 Vern. 684. (*n*) 5 Ves. 458.

and that it should not be in the power of them or any of them to anticipate, prevent, or destroy the trust, estate, or benefit of him or them appointed to succeed; and it was declared, that the trustees, their executors, &c., should or might, after any contract or agreement made touching alienation of the premises or any part thereof, but before any alienation should be actually made, or any act, matter, or thing done which might amount or be construed to prevent the said premises or the trust thereof from going, remaining, coming, or being, according to the limitations aforesaid, by sale or mortgage of all the said premises for and during the remainder of so much of the said term as should be then to come, or of a competent part thereof, raise the sum of 5000*l.*, or proportionably, according to the shares and proportions of the premises that should be contracted or agreed to be sold as aforesaid; or otherwise enter in and upon the said premises, and keep the same, until the said 5000*l.* or such proportion thereof as aforesaid, with interest at 5 per cent., should be fully satisfied and paid; and until the raising of such sum should raise out of the rents and profits the yearly sum of 500*l.*, or proportionably, according to the value of such part as should

be contracted to be sold, and pay the same unto such person or persons respectively as would from time to time be entitled to the premises, in case such person or persons contracting to alien the premises were actually dead, or as would from time to time, or for the time being, be injured, or intended so to be, by any alienation, act, matter, or thing, in case the person or persons so contracting or agreeing to alien were actually dead; and after raising the said 5000*l.*, or such proportion thereof as aforesaid, should place out the same at interest, and from time to time yearly pay such interest to such person or persons so injured or disappointed by such alienation, act, matter, or thing, or intended so to be, other than the person or persons so contracting or agreeing to alien; and that the said principal sum of 5000*l.*, or such proportion thereof and interest as aforesaid, should be reserved and employed for the benefit of such person or persons respectively and successively, to whom the estate, use, and trust of the said premises, according to the true intent and meaning of the aforesaid limitation, is appointed, other than the person or persons so contracting, &c., as aforesaid; and after raising the 5000*l.*, or such propor-

tion thereof and interest as aforesaid, with costs of the trustees, the term should cease.

The deed contained a power to C. by deed or will to revoke the uses and appoint new uses.

The Master of the Rolls declared the trusts of the term of 1000 years, as tending to a perpetuity, and being inconsistent with the rights of the several persons to whom estates in tail were limited by the said deed, were void and of no effect.

But the trust of a term for raising portions on either of two contingencies, of which one was within the allowed limits, has been held to be good on the happening of that event.

In *Longhead* d. *Hopkins* v. *Phelps* (*o*) a term of 1000 years was created by marriage-settlement, upon trust, "that in case the settlor should happen to die without issue male of his body, on the body of his intended wife begotten, or if all the issue male between them should happen to die without issue, and there should be issue female of the marriage, which should arrive respectively at the age or ages of 18 years, or be married; then, from and after the death of the survivor of the settlor and his wife without issue male, *or in case* at

(*o*) 2 Black. 704.

the death of the survivor there should be issue male, then from and after the death of such issue male without issue, the trustees should raise 500*l.* for one daughter, 1000*l.* for two, and in case of three or more, should assign the whole term to their use." There was issue of the marriage one son and four daughters, who all lived to 18, and were married. The father died, then the son died without issue. Afterwards the mother died, and then the four daughters entered, and an ejectment was brought against them by a devisee of the son. And in support of the ejectment it was argued, that the trusts of the term were void, being on too remote a contingency, *viz.*, the dying of the issue male of the marriage without issue generally. But the court were clear that the first part of the contingency was good, *viz.*, " in case the settlor and his wife died without leaving issue male ;" and as that happened in fact to be the case, the court would not enter into the consideration, how far the other branch of the contingency might have been supported, which could only come in question in case the son had survived both his parents.

Mr. Fearne observes, that a term or personal estate cannot, properly speaking, be intailed, for where a term or other personal

estate is limited to one in tail, it is an absolute and complete disposition of the whole term to him and his executors; he may dispose of it as he pleases; if he does not dispose of it, it goes to his executors and not to his issue; and it does not revert for default of issue. And after noticing a distinction taken by Lord *Coke* between a devise of a term in gross, and of a term *de novo*, out of the inheritance, *viz.*, that a devise of a term *de novo* to one and the heirs of his body, shall endure no longer than he has heirs of his body; he shows that such distinction has been since overruled or denied to be law.

III. That the limitation in a deed of chattels to one in tail vests the whole in him, is proved by the following cases.

In *Bullock* v. *Knight* (*p*), (1682), B. being possessed of a term for 1000 years, in consideration of a marriage to be had between H. his son and C., granted the same to trustees, in trust that B. should receive the profits till the marriage, and after the marriage to permit H. and his assigns to hold the premises and receive the profits for so long of the said term as he should live, and no longer; and, after his decease, should permit the said C.

(*p*) 1 Ch. Ca. 265. 2 Ch. Ca. 114.

and her assigns to hold and enjoy the premises and receive the profits for so long of the term as she should live, and no longer; and after the decease of the survivor of H. and C., should permit the premises to be enjoyed by the issues of the bodies of the said H. and C. between them to be begotten, for and during so long of the said term as such issue should have a being and continue *in rerum naturâ*, to take and enjoy in like manner as heirs in special tail by course of descent do hold and enjoy; and for default of such issue then over.

The Lord Chancellor, after great deliberation, declared that the limitation to the issue in this case vested the estate in H. and C., and not in the issue.

In *Webb* v. *Webb* (*q*), (1710), on the marriage of A., his grandfather assigned a term of 1000 years in trust for A. for life, then to A.'s wife for life, and, after their deaths, for the heirs of the bodies of A. and his said wife; the wife died leaving issue; A. survived. It was determined that the whole term vested in A.

In *Theebridge* v. *Kilburne* (*r*), (1750-1), a term was limited by deed in trust for S. dur-

(*q*) 1 P. W. 132. (*r*) 2 Ves. 233.

ing her life, and immediately from and after her decease to the heirs of the body of S. lawfully to be begotten, if the term should so long endure; and in default of such issue then to B. Lord *Hardwicke* expressed himself of opinion that the whole term vested in S. (*s*)

The effect is the same if the limitation of the chattels be made by reference to the limitations of real estate in strict settlement; they vest absolutely in the first tenant in tail who comes *in esse*, even although the words "as far as the law will admit" are added (*t*); it is, therefore, now usual (*u*) to insert a declaration, that such chattels shall not vest absolutely in any child, by the settlement made tenant in tail of the fee simple hereditaments, unless such child shall attain the age of 21 years: this has so far the effect of assimilating the trusts of the chattels to the uses of the real estate, and keeping both in the same line of devolution, that no child will become absolutely entitled to the former, until he is of sufficient age to acquire the complete dominion over the latter.

(*s*) But see post, ch. iv. s. 1.

(*t*) See the Duke of *Newcastle* v. the Countess of *Lincoln*, post 90, and the cases there cited.

(*u*) Co. Litt. 290^{b}. n. (1) x.

But when the limitations of trusts of chattels are executory only, a future instrument being requisite for the accomplishment of the trusts, greater latitude of construction is admitted, and a court of equity, having the direction of the settlement, assumes the power of moulding the limitations to effect the purpose of the parties, so far as those purposes can be collected from the executory instrument.

The case of the Duke of *Newcastle* v. the Countess of *Lincoln* (*v*) is an important authority on this subject. By deeds dated in 1772, freehold estates were settled by A. and his father to certain uses, with a power of revocation; and A.'s father covenanted to convey leaseholds for years in trust for himself for life, and after his decease in trust for A. for life, and after his decease in trust for the first and other sons of A. successively, as far as the law would allow. By the marriage-settlement of A., dated in 1775, the uses of the freehold estates were revoked, and those estates were limited to him for life, remainder to his first and other sons successively in tail male, remainder to his brother B. for life, remainder to his first and other sons succes-

(*v*) 3 Ves. Jun., 387.

sively in tail male, with other remainders over; and the father covenanted to assign to trustees the same leasehold estates, in trust for and for the benefit of such person and persons, and for such or the like estate and estates, and for such or the like ends, intents, and purposes, as are therein before-mentioned of and concerning the freehold estates, as far as the law in that case would allow and permit.

A. died, leaving issue a son and a daughter; the son died without issue, being an infant of the age of nine months; B. died leaving sons. The bill was filed by the eldest son of B. to have the covenant to convey the leaseholds carried into execution, and praying that such a clause might be inserted in the conveyance as should prevent the absolute vesting of the leaseholds, until the persons successively entitled to the possession thereof should have attained the age of 21 years. Lord *Loughborough* C. decreed, that the leaseholds should be settled in trust for B.'s eldest son, his executors, administrators, and assigns; but if he should die under the age of 21 years, without leaving issue male of his body living at the time of his death, then in trust for B.'s second son, his executors, administrators, and assigns; with a limitation over in case of his

death under 21, without issue male living at his death, &c.

This decree was varied upon appeal (*w*), by omitting such part thereof as is subsequent to the declaration, that the leaseholds ought to be settled in trust for B.'s eldest son, his executors, administrators, and assigns, it being then unnecessary, from the circumstance of his having attained the age of 21 years, to decide anything touching that part of the decree so left out.

It seems important to notice, that the power of revocation in this case did not attach upon the leasehold estates, nor did the marriage settlement affect to execute the power with reference to them; and that the only trust by the deed of 1772 created of those estates, subsequently to that for A. for life, was for the first and other sons of A. successively, as far as the law would allow. Lord *Eldon* observed upon that point, "if the decision upon the settlement of 1772 (*x*), [*be*] that the property either should vest in the first son, not upon his birth, but at the age of 21, or should divest if he died under that age without issue male, as the fact hap-

(*w*) 12 Ves. 218.

(*x*) It is 1775 in the report, but that is obviously an error.

pened, the covenant is gone by the course of events that have happened, and so much of the leasehold estates as was not taken out of the Duke [A's father], remained in him, to be considered as the subject of the settlement of 1775."

In this case, the prior decisions on the subject were investigated and discussed by Lord *Eldon* as a peer, Lord *Erskine* being then Chancellor, and the reasoning of Lord *Hardwicke* in *Gower* v. *Grosvenor* (*y*), in opposition in some measure to the later cases of *Foley* v. *Burnell* (*z*), and *Vaughan* v. *Burslem* (*a*), appears to have furnished the principles on which it was determined. Lord *Hardwicke* said, it was the known practice of conveyancing, to limit leasehold estates to a tenant for life; then to the son, either to be absolutely vested in him when he shall attain the age of 21, or upon his birth, to be divested if he dies under that age, and to go over, but not upon the simple contingency of his death under the age of 21, as Sir *Joseph Jekyll* says, but if he shall die under the age of 21 without issue generally, if the object be to limit an estate in tail general, or without

(*y*) 3 Barnard.
(*z*) 1 Bro. C. C. 274.
(*a*) 3 Bro. C. C. 101.

issue male, if an estate in tail male be the object.

But Lord *Eldon* pointed out the inadequacy of these provisions, for effectuating that which is assumed to be the primary purpose, *viz.* to keep the freehold and leasehold estates together as far as the law will admit; this, his Lordship observed, is not carrying it as far as the law will permit; for the moment a son comes to the age of 14 he may, subject to the contingency of his death under the age of 21, not leaving male issue, bequeath the leasehold estate. Suppose he dies under the age of 21, leaving issue male, that issue male would not take the leasehold estate, as he would the real estate; but the leasehold estate would be part of his general personal estate; which may go to his next of kin, and equally to the wife with them; or in some parts of the kingdom, the larger portion to the wife.

His lordship said, this decree cannot serve as a guide to conveyancers, as to what is to be done under any other circumstances than a tenant in tail in possession attaining the age of 21. And in *Burnell* v. *Crutchley* (*b*), he observed, that he did not take the case of the Duke of *Newcastle* to have decided anything, with

(*b*) 15 Ves. 553.

regard to any case that might possibly arise, except that precise case. The Duke had attained the age of 21, but the difficulty that always occurred to his Lordship upon it was, what was to become of it, if the party died under that age leaving issue.

It seems difficult to suggest any other mode of settlement which, in such a case, would approximate nearer to the obvious intention; to limit the leaseholds over to the second son on the death of the first, leaving issue inheritable to the estate tail, would at once defeat the intention; the absolute vesting could not be suspended during the minority of such issue; a provision of that nature would be too remote; and the purposes might not be executed by limiting over the leaseholds to the issue, on the death of the parent under twenty-one, for the issue might die in early infancy: but if he absolute interest be vested in the parent, there is a great probability that the freehold and leasehold estates will be kept together, during a longer period than could be provided for by the settlement; and this mode of limitation appears to unite, more than any other, conformity to practice and execution of the purpose. Such a settlement would, perhaps, as nearly as any which, without too much of

refinement, could be devised, be consistent with that which Lord *Eldon* thought, if it were *res integra*, the best principle; that it should be considered, that the court was furnished with all the means of enabling the party to tie up the property, not as long as the rules of law will admit, but to that convenient extent which will enable him to execute the general primary purpose of the will or settlement, to carry together the real and personal estates. And indeed this principle seems to have been admitted in the above-mentioned case of *Burnell* v. *Crutchley*, for there Lord *Eldon* C. expressed his opinion, that the settlement intended, of the two thirds of the portion, was in conformity to the limitations of the real estate, (which was devised in strict settlement,) and that the interest of an eldest son would be divested only by his death without issue male under the age of 21.

It should be observed, that under that which is stated to be the usual qualification of trusts of personalty, declared by reference to the limitations of real estate in strict settlement (*c*), in the event of a son dying under 21, leaving issue inheritable to the estate tail, the real and personal estates would im-

(*c*) Ante, p. 49.

mediately be separated. It is submitted, therefore, the declaration should be, that the chattels shall not vest absolutely in any child, by the settlement made tenant in tail of the fee simple hereditaments, unless such child shall attain the age of 21 years, or die under that age, leaving issue of his body living at his decease.

It is true, that according to the usual mode of limiting personalty in settlements of that description of property only, although an absolutely vested interest is given to daughters at 21, or marriage under that age, such an interest is only given to sons on their attaining that age; but this does not appear to be inconsistent with a different arrangement when real estate is also the subject of settlement; in the former case the object may be to discourage or provide against early and imprudent marriages; in the latter the primary purpose generally is to carry together the real and personal estates.

In the Duke of *Newcastle* v. the Countess of *Lincoln*, Lord *Eldon* is represented to have said, that there is no difference in the execution of an executory trust created by a will, and of a covenant in marriage articles; but in *Jervoise* v. the Duke of *Northumberland* (*d*),

(*d*) 1 Jac. & Walk. 574.

his Lordship explained his meaning; in marriage articles, he observed, the object of such settlement, the issue to be provided for, the intention to provide for such issue, and in short, all the considerations that belong peculiarly to them, afford *primâ facie* evidence of intent, which does not belong to executory trusts under wills; but he took it, according to all the decisions, allowing for that, an executory trust in a will is to be executed in the same way.

IV. Mr. *Fearne* states, that although a devise over after a dying without heirs is in general void, yet this rule is not without exceptions; for he observes, if the person to whom the limitation is made, be a relation of, and capable of being collateral heir to the first devisee, in that case the first devisee takes only an estate tail; because the limitation over to the collateral heir plainly denotes that only lineal heirs could have been intended.

I have not been able to find any case upon a deed in which this point has arisen; there are, however, several cases which show that the word heirs, even as a word of limitation in a deed, is not of such a peremptory and inflexible signification as not to admit of explanation, as to the class of heirs intended, if

that class be designated with sufficient precision.

Thus in *Beck*'s case, otherwise *Boreton* v. *Nichols* (*e*), upon a feoffment to the use of the first son begotten of the body of J., that should have heirs male of his body, and to his heirs *in perpetuum*, and in default of such issue of his body, &c.; it was held that the limitation to the first son, &c. of J., gave such first son only an estate tail.

And it is said in *Plowden* (*g*), if a man make a feoffment to another, to have and to hold to him and his heirs, *et si contingat* that the feoffee die without heirs of his body, that then the lands shall revert; the feoffee takes only an estate tail, the generality of the gift being corrected by the subsequent clause. And the same case is put by Lord Keeper *Wright* (*h*).

The case of *Idle* v. *Cook* (*i*) was a surrender of copyhold lands, to the use of *Valentine* and *Alice* his wife, *pro & durante termino vitarum suarum, & hæredum & assignatorum prædictorum Valentine* and *Alice, & pro defectu talis exitus, &c.*; this was held, *Gould* J. dissent-

(*e*) Litt. Rep. 159. 253. 285. 315. 344. Cro. Car. 363.

(*g*) 541. a.

(*h*) 1. P. W. 57.

(*i*) 1. P. W. 70.

ing, to be a fee simple in *Valentine* and *Alice*. *Powis* J. said, " it would have been otherwise if the words had been, and for want of issue of the survivor." And *Holt* C. J. said, " in the present case here is no certainty of whose body the heir shall be; and the words are sufficient to carry a fee-simple; *indeed, in a will, such words would make an estate tail*, purely upon the intent of the devisor; but there is a great difference betwixt a will and a conveyance at common law, as this is; for the law has appointed proper words to be made use of in limitations of estates in deeds, as the word, heir, to carry a fee-simple, and no other word tantamount or equivalent will be admitted; whereas, in a will it is otherwise; for that is a new conveyance by force of the statute of 32 Hen. 8, which says, it shall be lawful for a man to dispose of his lands by will, at his will and pleasure; and this is the reason why a devise to a man *in perpetuum* passes a fee-simple, at the same time that these words in a deed give only an estate for life. In this limitation we have no restrictive words to turn the estate, that by force of the first words is a fee-simple, into an estate tail; indeed, *if it had been said, if* Valentine *and* Alice *die without issue of their bodies, that, being express and particular, would*

have made it an estate tail; but, as it now stands, the first words carry a fee-simple, and the latter, being consistent with them, make no alteration in the estate."

The case of *Abraham* v. *Twigg* (*k*) was a feoffment by P. to the use of himself and his heirs of his body; and for default of such issue to G. and to his *heirs males lawfully engendered; and for default of such issue*, to the right heirs of P. The question was, whether G. took a fee-simple or fee-tail. It was argued, that although it was not limited to the heirs of his body, yet, being by way of use, which is expounded according to the intent, and as wills, it should be construed an estate tail. But it was held to be an estate in fee in G.; and it was said, that although it were by way of use, it differed not from other gifts by deed, and should not have any other construction.

In *Co. Litt.* [27 a.] it is said, "if a man, by his last will, devise lands or tenements to a man and to his *heirs males*, this, by construction of law, is an estate tail, the law supplying these words, of his body."

By these authorities it is apparent, that a limitation in fee in a deed may be controlled,

(*k*) 2 Cro. Eliz. 478.

and restricted to a limitation in tail, by other expressions, denoting that the word heirs was intended to be used in that modified sense; but they also show, that an expression or manifestation of intention, which in a will is sufficient, may in a deed be insufficient to produce that effect; for that, in a will, an apparent intention, that the devisee shall take an estate of inheritance less than a fee-simple, may be sufficient to control and restrain an express limitation of that nature to an estate tail; but that, in a deed, such apparent general intention is insufficient, it being necessary, also, to point out distinctly the body from which the special heirs are to proceed.

Such a limitation over as we are considering, evinces an intention, that the party shall not have an estate which will descend to his collateral heirs; but it must be admitted to be extremely doubtful, upon these authorities, and where there is no contract to guide the courts, whether, by such a limitation in a deed, the body from which the heirs intended to take are to proceed, is designated with sufficient precision, to warrant such a construction as would be adopted in the case of a will.

V. That a limitation may be to one and his heirs, with a future use to take place on an

event which must happen within the compass of a life in being, is shown by the cases before cited. (*l*)

VI. Upon the same principle, though a future trust of a term to vest on a dying without issue generally is not good, because too remote; yet, where the dying without issue is restrained to the period of a life in being, a future trust thereon limited will be good.

The earlier cases in opposition to this doctrine were overruled by the Duke of *Norfolk*'s case (*m*), which in effect was this:—H. having several sons, created a term of 200 years, and declared it to be in trust for his second son, and the heirs male of his body, remainder to his other sons; provided, that if his eldest son died without issue, or not leaving his wife ensient with a child, living the second son, or that after the death of the eldest son, by failure of issue male of his body, the earldom of A. should descend on the second son, then the trusts should cease as to the second son and his heirs, and then the trusts should be for the third son and the heirs male of his

(*l*) Ante, p. 65.

(*m*) 3 Ca. in Cha. 14., 2 Rep. in Cha. 121., Pollex. 223., and see an authentic note of Lord Chancellor *Nottingham*'s judgment in the case, 2 Swan, 454.

body, with like limitations to other sons. The eldest son died without issue, living the second son, and the earldom of A. did descend to the second son. Whether the executory limitation over to the third son upon that event was good, was the question. And Lord *Nottingham*, upon the ground of its being a limitation to take effect upon the dying without issue, within the compass of a life then in being, decreed it was a good limitation to the third son, contrary to the opinion of the three chief justices who assisted him; this decree was afterwards reversed by Lord Keeper *North*, but that reversal was again reversed upon an appeal to the House of Lords, who established Lord *Nottingham*'s decree.

And so in *Heywood* v. *Maunder* (*n*), a term for years was assigned in trust for the husband for life, then for the wife for life, and, after the decease of the wife, in trust for such of their children as should be then living, and their issues; and for default of such issue, in trust for the plaintiff. The husband and wife died without issue; and the question was, "whether this limitation of the trust of a term, after dying without issue, were good or

(*n*) 2 Free. 98.

not." The court said, "in this case it is good enough, for although where the trust of a term is limited to a man and his issue, it cannot be limited over, because issue may continue for ever, and the whole term is sunk in that limitation, nay, where the trust of a term is limited after the death of any one without issue, it is not good, because it would make a perpetuity, and issue may continue for ever, yet, in this case, it being upon a contingent, which must determine in a life, it is good enough, the contingent happening that no issue was living; and that was the reason they went upon in the Duke of *Norfolk*'s case."

It is obvious, from the above reasoning, that in this case, 'for default of such issue,' was construed, for default of such children.

VIII. It is the same, if the dying without issue be confined to the compass of 21 years, after the period of a life in being.

This appears by the case of *Massenburgh* v. *Ash* above cited. (*o*)

IX. With respect to future trusts declared by deed, as well as executory devises of terms for years or other personal estates, the court of Chancery has very much inclined to lay

(*o*) Ante, p. 75.

hold of any words in the deed, to tie up the generality of the expression of dying without issue, and confine it to dying without issue, living at the time of the person's death.

Thus in the case of *Exel* v. *Wallace* (*p*), a leasehold estate was settled on marriage, in trust to permit the husband to receive the rents and profits for life; afterwards to permit the wife to enjoy it during her life; after the decease of the survivor of them, then that the trustees should assign the said estate, together with the rents, issues, and profits, to the eldest son of the husband as should be by him begotten on the body of the wife; *and for want of such issue of such son*, in trust to assign the same to and among all and every the daughter and daughters of the husband and wife equally, share and share alike; if there should be no issue male or female of their two bodies, then to the use of B., his heirs, executors and administrators. The inheritance of a small copyhold estate was also comprised in the settlement. There was issue of the marriage, a son and two daughters; the father and one of the daughters died; then the son died without issue; afterwards the mother died, and the question

(*p*) 2 Ves. 117.

was, whether the remainder over to the daughters was valid.

It was contended, that if it had been a real estate, the son would have taken an estate tail, and that such words as in real estate would carry an estate tail, would in a term for years carry the whole term, and that therefore the limitation over to the daughters was void in law as tending to a perpetuity.

The Master of the Rolls said, a remainder over, on a general dying without issue, was too remote, and could not be supported; but if to be considered as a dying without issue living at the son's death, the remainder to the daughters would be good. Some words must have been omitted in the engrossment, as would appear from reading the clause. The first words "*such issue*," if they had stood alone, might naturally have referred to the eldest son, but the subsequent words showed that was impossible. The omission was unfortunately in the most material part of the deed, but whatever conjecture might be made how this happened, and however by the insertion of some words it might be made consistent, he could not go out of the deed itself, but must take it as it then appeared, and put the best legal construction he could upon it; and if it was capable of such a construction as

would answer the end, and not run into the danger of a perpetuity, (which the law endeavoured to avoid,) that surely was the construction the court ought to follow. He was of opinion, that might be done in the present case. If in every event the trust of the term expired within lives in being, it came within the compass allowed by law for its suspension, and the point of time was the death of the survivor of the father and mother, who were first provided for; on whose decease the trustees were to assign to the eldest son, if then such in being, and to assign the whole term to him, not for life only, which might be liable to objection. Then the words, "for want of such issue of such son," would prevent its going over to daughters, on there having been a son who died before, leaving issue. If there was no son and no issue, the trustees were then only to assign to the daughters, unfettered and as an absolute interest; and he observed the court always inclined to favour that construction which supports the limitation over, if it can be done, and had laid hold of all opportunities of referring it to a want of issue at the time of the death; and after noticing the cases upon wills, in which, where the words are *leaving no issue*, and *dying without issue*, the court had in the con-

struction supplied the words *then living*, to answer the intent, he observed, that in the present case from the omission, the words *such issue of such son*, had no antecedent to which *such issue* could be referred: then why should he construe that limitation over to depend on a general dying without issue at any time, when the deed did not say so; and he continued, that as the words were not plain, and to construe it, that if at the death of the father and mother there was no son, was more natural than to construe it a failure of issue 100 years thence, that ought to prevail; and he said, though all those cases were on wills, this, though on a deed, was as strong; and he decreed in favour of the daughter, and the decree was affirmed by the Lord *Chancellor*(*q*).

And in the cases of *Longhead* d. *Hopkins* v. *Phelps*, (*r*) and *Heywood* v. *Maunder*, (*s*) before cited, the same inclination is strongly manifested.

There is, as Mr. Fearne observes, a case of a very different nature from the foregoing, that of *Goodwin* v. *Clerk*, (*t*) where a portion for a daughter, limited after an indefinite failure of issue male, was allowed to take place. It was the case of a settlement on

(*q*) 2 Ves. 318.
(*r*) Ante, p. 85.
(*s*) Ante, p. 104.
(*t*) 1 Lev. 35. 2 Sid. 102.

husband and wife, for their lives, remainder to the first, &c., son in tail male, and if the husband should die without issue male, remainder for a term to raise 1500*l.* for portions for daughters; the husband died, leaving issue a son and a daughter, the son died without issue; it was adjudged that the daughter should have the 1500*l.*; for that whenever the issue male of the husband failed, he might properly be said to be dead without issue male: here we observe, as there was a preceding estate tail, a recovery suffered by the tenant in tail would have barred this term, and the daughter's portions; and therefore the allowing the limitation to take effect, was not running into the inconveniences of an executory devise (or future trust), limited on so remote a contingency, because this limitation was liable to be barred, whereas an executory devise is not.

X. Mr. *Fearne* states, that though the courts, in the case of personal estates, generally incline to pay attention to any circumstance or expression in the will, that seems to afford a ground for construing a limitation after a dying without issue, to be a dying without issue living at the death of the party, in order to support the devise over, yet in the case of a real estate, it seems the construction is generally otherwise; for

there we are to consider the interest of the heir at law is concerned, which is always much favored by our laws.

In exemplification of this position several cases upon wills have been cited, in which the words "leaving no issue," and others of the same signification, which, as applied to personal estate, would be restrained to leaving issue at the time of his death, have, when applied to real estate, been held to import an indefinite failure of issue; all which cases appear to have been founded upon the doctrine in *Forth* v. *Chapman*, (*u*) and it is important to consider the ground upon which that case was decided. The testator gave the residue of his real and personal estate to his nephews W. and G., and if either of them should depart this life and leave no issue of their respective bodies, then he gave the said premises to D. Lord C. *Parker*, after noticing the manner of pleading in a *formedon*, upon which dying without issue is held to mean an indefinite failure of issue (*x*), said, that the reason why a devise of a freehold to one for life, and if he die without issue then to another, is determined to be an estate tail, is in favour of the issue, that such may have it and the intent take place; but that there is the

(*u*) 1 P. W. 663. (*x*) Ante, p. 77.

plainest difference betwixt a devise of a freehold and a devise of a term for years; for in a devise of the latter to one, and if he die without issue, then to another, the words (if he die without issue) cannot be supposed to have been inserted in favour of such issue, since they cannot by any construction have it; and after observing that the devise carried a freehold as well as a leasehold, he nevertheless thought it might be reasonable enough, to take the same words, as to the different estates in different senses; and that as to the freehold, the construction should be, if W. or G. died without issue generally, and as to the leasehold, the same words might be construed to mean a dying without leaving issue at their death, *ut res magis valeat quam periat.*

The true ground then of the difference in construction in this case appears to have been, a desire to answer the intent of the testator, so far as it was consistent with the rules of law. D. was not intended to take anything until all the issue of W. and G. were extinct, and the issue were evidently objects of the testator's bounty; by construing the limitation of the real estate to W. and G. an estate tail, their issue would take in succession; but by giving the same latitude of construction to the gift of the personal estate,

the absolute interest thereof would have been vested in W. and G., and the issue would not have taken anything; therefore, to have construed the gift over of that property in a different sense from the natural import of the words, would not have answered the intent of the testator.

That this was the view which Lord *Hardwicke* took of the ground of this construction, with regard to real estates, appears by his observations in *Southby* v. *Stonehouse* (*y*), where the testatrix devised to her children, if she should leave any to survive her; but if she should leave no such child or children, nor the issue of such, to H. His Lordship said, she meant to describe, if she should leave no children at the time of her death, nor issue at any time. He said, that to make estates tail continue in the regular intail, much stronger decisions had been made, notwithstanding the words seemed to have been confined to a particular time, and not a general dying without issue; and he referred to several cases where, as he observed, a construction had been made to answer the intent of the testator, and to keep the estate in the proper channel of descent, according to the intent, by holding, that though the words pointed out

(*y*) 2 Ves. 615.

a dying without issue at the time of the death, it related to a failure at any time afterward.

And accordingly, in those cases where the words, "leaving no issue," and others of the same signification, have, as applied to real estate, been held to import an indefinite failure of issue, the effect has been to enlarge or reduce a prior estate to an estate tail, by which construction provision was made for the issue.

This, then, being the only principle upon which the expressions in question have had a different interpretation, when applied to estates of a different nature, there appears to be strong ground for contending, that in cases to which that principle could not be applied, no such difference of construction would prevail; but that, as well with regard to real as personal estates, the courts, unfettered by the rules of construction established by, or adopted in conformity to the pleadings in real actions, would, if not inconsistent with the apparent intent, assign to the limitations over their common and natural signification.

It seems essential to ascertain the true grounds and principles of the doctrine which we have been considering, with a view to the application of that doctrine to limitations by

deed; for we have seen that a limitation over, which in a will would restrict a prior estate in fee to an estate tail, not being sufficiently precise and definite, would not have that effect in a deed. (*z*) Supposing, then, a limitation in a deed to A., his heirs, and assigns, followed by a limitation to take effect in case he should die without leaving issue; upon the authority of *Idle* v. *Cook* (*a*), and *Abraham* v. *Twigg* (*b*), it is clear this limitation over could not reduce A.'s estate in fee to an estate tail, and the question is, whether it could be supported as a springing use? From the enquiry we have pursued, it is obvious that the principle upon which the words, "leaving no issue," &c., have, when applied to real estate, been held to import an indefinite failure of issue, has no reference to a case of this description; and, therefore, there appears to be no reason to doubt, that this limitation would be construed in the same manner as if it were a limitation of a trust of personal property, and that the springing use would be valid.

In *Porter* v. *Bradley* (*c*), a devise of real estate, to take effect "if he die leaving no issue behind him," was held to be a good exe-

(*z*) Ante, p. 102.
(*a*) Ante, p. 99.
(*b*) Ante, p. 101.
(*c*) 3 T. R. 143.

cutory devise. In *Roe* v. *Jeffery* (*d*), and *Doe* v. *Webber* (*e*), the same construction was adopted upon the words, "depart this life and leave no issue," or words of similar import, the context of the wills admitting of or requiring that construction. And in the before-mentioned case of *Exel* v. *Wallace* (*g*), Lord *Hardwicke* expressed his opinion that the words, "for want of such issue of such son," should be construed in the same manner with reference to the copyhold as the leasehold estate.

XI. Mr. *Fearne* observes, that in all the cases of personal estate, where such restrictive circumstances as he had been instancing appear, it matters not whether the term or other personal estate be limited to the first devisee or legatee indefinitely, or for life expressly, or to such legatee and his heirs, or heirs of his body, or issue or children, for that the restriction is equally valid under any of those circumstances, and gives effect to the limitation over.

That the rule may be applied to the same extent in cases arising upon deeds, is to be inferred from those of *Exel* v. *Wallace* (*g*) and

(*d*) 7 T. R. 589. (*e*) 1 Barn. and Ald. 713.
(*g*) Ante, p. 106.

Heywood v. *Maunder* (*h*), and the *Duke of Norfolk*'s case (*i*), before cited, and the reasoning upon which those decisions are founded.

XII. Mr. *Fearne* notices the diversity, which has in some cases been contended for, between a limitation of a term by such words as, in the case of real estate, would give an express estate tail, and a limitation of the same by such words as, in the case of a real estate, would only give an estate tail by implication; upon this principle, that where the words of a will, if used with regard to an inheritance, would give an express estate tail, there the same words applied to a term will pass the whole interest in that term; but that where the words of the will, if applied to a freehold, would give an estate tail by implication only, there they will not enure to give the whole interest in the term; and, consequently, that where a term is limited to one, and if he die without issue, remainder over, this limitation will not vest the whole term in him, as a limitation to the heirs of his body or to his issue would do, but are always to be understood restrictively, and to relate only to his dying without issue living at his death,

(*h*) Ante, p. 104. (*i*) Ante, p. 103.

and therefore give him the term only during his life.

But the authorities he cites show that, with regard to wills, no such distinction exists, either in respect to the validity of the subsequent limitation over, or in regard to the whole not vesting in the first devisee or legatee.

I have not been able to discover any case upon deeds in which these points have arisen, but (except that in such a case a more precise designation of the body may be necessary to vest the absolute interest, in conformity to the doctrine upon raising an estate tail by implication in real estate, (*k*)) there does not appear to be any reason to infer that, in these instances, the general analogy between executory devises and trusts of terms in any degree fails; or that the distinction collected by Mr. *Fearne* from a comparative view of all the cases upon wills, and stated by him with so much precision and accuracy, ought not also to be adopted upon and to govern the decision of cases arising upon deeds, *viz.*,

That although in the limitation of a personal estate after a dying without issue, those words shall not *ex vi termini*, and without the

(*k*) Ante, p. 102.

concurrence of any other circumstance of intention, signify a dying without issue then living, even though the limitation is in the nature of an estate tail by implication only; yet, on the other hand, they shall not *ex vi termini*, when there is any other circumstance of intention, import an indefinite failure of issue, even though the limitation is in the nature of an express estate tail; but that in either case, if the limitation rests solely upon the usual extent and import of those words, the limitation over is too remote, and therefore void, and the whole vests in the first devisee or legatee; but that, in either case, the signification of these words may be confined to a dying without issue then living, by any clause or circumstance in the will, which can indicate or imply such intention.

And this distinction certainly is not impeached by the doctrine of *Ashhurst* J. in *Doe* v. *Lyde* (*l*), that where there is no express legal limitation the court will consider the intention of the testator.

XIII. Another distinction which has been insisted upon also appears, as well with regard to deeds as wills, to be without foundation, *viz.*, that where a personal estate was limited

(*l*) 1 T. R. 596.

to one for life expressly, and if he die without issue, remainder over, such remainder over was good; because the express estate for life should not be enlarged by mere words of implication.

In the case of *Pearse* v. *Reeve* (*m*), the limitation was to R. and his wife for their lives expressly, and if they should die without issue, remainder over; and the remainder was held void.

The only difference between a limitation of a term, &c., to one for life expressly, and if he die without issue, remainder over; and a limitation to one indefinitely, and if he die without issue, remainder over, appears to be, that in the former case there is more ground than in the latter, to contend for a resulting trust for the settlor.

XIV. Upon the distinction between a dying without issue generally, and a failure of issue confined to the period of a life in being, Mr. *Fearne* observes, it seems to follow that though an executory devise in tail or in fee to one *in esse*, after a dying without issue is void; yet an executory devise for life to one *in esse*, to take place after a dying without issue, may be good; because, in the latter case, the fu-

(*m*) Ante, p. 81.

ture limitation being only for life of one *in esse*, it must necessarily take place during that life, or not at all; and therefore the failure of issue, in that case, is confined to the compass of a life in being.

Upon this principle, he says, it appears that the resolution in the case of *Oakes* v. *Chalfont* (*n*) (a case upon a deed), that the limitation to S. was good, may be accounted for and maintained; and he observes that there the limitation to S. was only for life, so that if all the preceding trusts did not fail or expire in the lifetime of S., that limitation could not take effect; and, consequently, it was confined to the period of a life in being, *viz.*, the life of S., and therefore did not create a perpetuity.

In the seventh edition of Mr. *Fearne*'s essay, it is said, in the margin, that in *Barlow* v. *Salter* (*o*) the soundness of the decision in *Oakes* v. *Chalfont* seems to be doubted; but on examination it will be found, that the rule in question is not impeached, but is confirmed by the doctrine in that case.

There the testatrix bequeathed to her daughter in the following terms, "All my estate real and personal of every sort and

(*n*) Ante, p. 29. (*o*) 17 Ves. 483.

kind to her and her heirs, and half the navigation money for her natural life; and in case she dies without issue, all to be divided between my four nephews and nieces, N., W., C., and E.; C.'s part only for life, and her part to be divided between the survivors."

It was admitted that there was no real estate.

In contending that dying without issue meant living at her death, it was said that one circumstance which occurred in this case, that the limitation over upon the failure of issue was for life, had been considered as decisive evidence of the intention for the limited construction.

The Master of the Rolls said, where nothing but a life interest is given over, the failure of issue must necessarily be intended a failure within the compass of that life; but where the entire interest is given over, the mere circumstance that one taker is confined to a life interest, furnishes no indication of an intention to make the whole bequest depend upon the existence of that person, at the time when the event happens, on which the limitation over is to take effect. And he added, if there is any case which has ascribed to the circumstance of a devise over for life,

the effect here contended for, I must beg leave to doubt the soundness of the decision.

Certainly the rule, as contended for by Mr. *Fearne*, does not go to that extent; for in this case it will be observed, that one only of the four persons, to whom the bequest over is made, is to take a life interest, and her part is to be divided equally among the survivors, the other three persons taking absolute interests: to this case, therefore, the principle in question clearly does not apply.

So it seems that future uses or trusts, limited to take effect at a period which exceeds the boundary of such limitations, may be valid, if created in estates or interests, the extent or duration of which does not exceed that boundary.

Thus, in *King* v. *Cotton* (*p*), where A., tenant for life, demised to trustees for 99 years, if she should so long live, in trust for herself during her widowhood, and after her marriage, then in trust for C., her second son, and the heirs of his body; and if he died without issue, then in trust for D., her next son. Upon the question, whether the limitation over to D. was good, it was said, that the only objection to limiting a term to one

(*p*) 2 P. W. 676.

and the heirs of his body, and then over in default of issue, was, because it would make a perpetuity; but here the whole term being to determine on A.'s death, there could be no perpetuity; nor, indeed, as Mr. *Fearne* says, could there, for the subsequent limitation could not possibly take effect unless it was in the lifetime of A. And he observes, the court, it appears, gave no opinion on this point; but the reporter (with good reason, as it seems), adds, *ideo quære*, though it seems rather to be a good limitation of the trusts, and within the reason of the *Duke of Norfolk*'s case, and the several other subsequent resolutions grounded thereupon.

CHAPTER IV.

OF OTHER MATTERS RELATING TO SPRINGING USES, AND OTHER LIMITATIONS CORRESPONDING WITH EXECUTORY DEVISES.

I. We have seen by the cases of *Webb* v. *Webb* and *Theebridge* v. *Kilburne* (*a*), that if a term be limited for one for life, and afterwards for the heirs of his body, these words are generally words of limitation, and the whole vests in the first taker.

But if there appear any other circumstance or clause in the deed, to show the intention that these words should be words of purchase, and not of limitation, then it seems the ancestor takes for life only, and his heir will take by purchase.

As instances of this, Mr. *Fearne* mentions two cases of limitations of the trusts of a term in marriage-settlements.

Peacock v. *Spooner* (*b*), (1690), where a term for 900 years was assigned, in trust to permit

(*a*) Ante, p. 88. (*b*) 2 Vern. 43. 195. 2 Freem. 114.

the husband and wife, and the survivor of them, to receive the profits for so many years as they, or the survivor of them, should happen to live, and after their deaths, to the use of the heirs of the body of the wife by the husband to be begotten; Lord Chancellor *Jefferies* decreed that the whole vested in the wife; but afterwards the Lords Commissioners decreed that the heir of the body took by purchase, and that it did not vest absolutely in the mother who survived, so as to go to her administrator. This decree was afterwards affirmed in the House of Lords, though the judges were six to two against it.

And *Dafforne* v. *Goodman* (*c*), (1698), a similar case, in which the same point was afterwards decreed; there a term was assigned, in trust to permit J. to receive the profits for so many years of the term as he should live, and after his death to permit A., his intended wife, to receive the profits for so many years of the term as she should live, and after both their deaths, to permit the heirs of the body of A. to be begotten by the said J., to enjoy the lands for the residue of the term. This latter decree was grounded on the authority of the preceding.

(*c*) 2 Vern. 362. 2 Freem. 228. 231.

It is true, Mr. *Fearne* observes, no particular expression in either of these cases determined the intent to be, that the heir of the body should take as a purchaser; but these being cases of marriage-settlements, it was reasonably enough inferred, that the issue of the marriage were intended objects of the settlement, and the term not designed to vest wholly in the mother. But afterwards, he says, in a subsequent case of a marriage-settlement, a decree at the Rolls, grounded upon the case of *Peacock* v. *Spooner*, was reversed, and the limitation to the heir male decreed to be void.

This was the before-mentioned case of *Webb* v. *Webb* (*d*), which, Mr. *Fearne* says, appears to have been the ruling authority ever since in cases of the like nature; and that of *Peacock* v. *Spooner*, it seems, is only attended to in cases exactly the same in specie with itself, as was that of *Dafforne* v. *Goodman*, as reported by *Freeman*. (*e*)

But he observes, there have been other cases which have proceeded entirely upon circumstances of evidence of the intention. As *Hodgson* v. *Bussey* (*g*), (1740), where a term

(*d*) Ante, p. 88. 1 Eden's Ch. Ca. p. 8.

(*e*) See Fearne's Posthumous Works, p. 388.

(*g*) 2 Atk. 89.

was settled in trust for one, if she should so long live, and after her decease, in trust for her husband, if he should so long live, and after his decease, in trust for the heirs of the body of the wife, begotten by the husband, and their executors, administrators, and assigns; Lord *Hardwicke* decreed, that the limitation to the heirs of the body, &c., were words of purchase, as he held the addition of the words executors, administrators, and assigns, strong evidence of the intent to give only an usufructuary interest for life, and to vest the property in the heirs of the body.

And so indeed, Mr. *Fearne* observes, in the above cited case of *Theebridge* v. *Kilburne* (*h*), though Lord *Hardwicke* was rather of opinion, that the whole term vested in S., and that there was no ground for any other construction, unless from the word 'immediately,' which he thought was too precarious; yet he seemed not to be very confident that the limitation to the heirs of the body might not, even in that case, operate as words of purchase, and held that the limitation then would have vested in the son of S., who died an infant in her life-time, though he did not live to answer the description of heir; for

(*h*) Ante, p. 88.

that it would then amount to the same thing as if it had been to the issue o her body; and that where the words heirs of the body, when taken to be words of purchase in such a limitation, have been construed in the sense of issue, it was never held necessary that the issue should survive the first taker, so as in strictness to be heir; for that it was not like a limitation to the heir of the body in the singular number, which would be such a description as to shew, that such person as was strictly heir should take.

And in *Ward* v. *Bradley* (*i*), (1687). A. possessed for 2000 years of a tenement, in consideration of a marriage to be had and after had, and of 350*l.* portion, and for provision and stay of living of the husband and wife and their children, demised to trustees for 1700 years, if he and his wife, or any of their issue lived so long, *in trust for* A. *during* 99 *years* (*k*), remainder to the heirs of the body of A. on that wife. They had issue three daughters, two of whom got an assignment of the whole term, and had administration to the father. And the question was,

(*i*) 2 Vern. 23.

(*k*) Words to this effect appear to have been omitted in the case, as stated in Vernon.

whether the third daughter was entitled to a third with her sisters. And though it was contended that the trust of the whole term vested in the father, and was executed in him; and that the daughters, though the heirs of his body, could not take by purchase in this case, yet the Master of the Rolls conceived that, inasmuch as there was a particular term of 99 years taken out of the 1700, and the father had a particular estate limited unto him during 99 years, the trust of the whole term during the 1700 years was not executed to the father. And his Honor said, that construction of trusts must be governed by intention; and this being the case of a marriage settlement, and the intention plain, it ought to be supported; and his Honor conceived in this case, that though the word heirs was not properly a word of purchase, yet there being a particular estate for life during a particular term limited to the father, that the limitation to the heirs of his body, afterwards on that marriage, would carry it to all the children equally; and he was the more of that opinion, because it was declared in the deed, that after the death of the father, the trustees should execute estates to the person and persons respectively that should be interested, according to their respective shares

therein; which showed that the children should all take their several shares.

II. It seems formerly to have been held in some cases, that a trust of a term for a person not *in esse* was void (*l*); but that point has been long since settled to the contrary, as appears by the cases of *Exel* v. *Wallace* (*m*), and *Hodgson* v. *Bussey* (*n*); and it is certain that any trust, whether to a person *in esse* or not is good, if confined to take effect within the limits before expressed.

III. Certain limitations of subsisting leases for lives, neither have the effect of regular limitations of estates of inheritance, nor yet operate as springing or future uses. Thus it is if a person, seised of an estate *pur autre vie*, limit it to one, and the heirs of his body, or, in general, to one in such manner as would give him an estate tail in lands of inheritance, remainder over; the limitation, in these instances, makes no estate tail properly so called; for all estates tail must be of inheritance, nor are these limitations springing or future uses: but it appears, that the limitation to the heirs of the body may carry the estate to them, and a remainder over may take effect, if the per-

(*l*) Poll. 28. 32.
(*m*) Ante, 106.
(*n*) Ante, 127.

son entitled by virtue of the limitation in tail make no disposition of the estate. But the person entitled under the limitation in tail, it seems, may, if he think fit, dispose of the whole, and bar as well the remainder over, as his own issue.

Thus in the case of *Norton* v. *Frecker* (*o*), where N., holding lands to him and his heirs for three lives, upon his second marriage, settled the same to the use of himself for life, remainder as to part to the use of his first and every other son in tail male, remainder to his own right heirs; and as to other part, to the use of such child or children of the marriage, and for such estates as he should by deed or will appoint, and for want of such appointment to the first and every other son in tail male, remainder to his own right heirs. There were several children of the marriage, and afterwards upon the marriage of R., the eldest son, N., by deed which was also executed by R., settled the lands in trust for himself for life, remainder to R. for life, and if he should die without issue male of his body, remainder over.

Upon a claim after the decease of R. without issue, by a son of a younger son of N's.

(*o*) 1 Atk. 524.

second marriage, Lord *Hardwicke* was of opinion, that by virtue of the remainder limited to the first and other sons in the first settlement, the plaintiff would be entitled, if nothing had been done subsequent to bar his right. He said that in the case of *Wasteneys* and *Chapple*, in the House of Lords in 1712 (*p*), it was determined, that in respect to estates thus granted in fee determinable on lives, a person may take by way of remainder as a special occupant; but that as such an estate tail is not within the statute *de donis*, nor barrable properly by a recovery as an estate tail, any limitations depending thereon are entirely in the power of the first taker in tail, and may be destroyed by any conveyance or even articles in equity, and that it was so determined in the case of the Duke of *Grafton* v. Lord *Euston* in 1722 (*q*), in which his Lordship was counsel himself. That the latter settlement, in the principal case, amounted to a good disposition by R., of all the interest claimable by him, or any other in remainder after him; clearly so with regard to the first part of the lands, tenant for life and remainder man in tail of an interest vested having joined in the

(*p*) 1 Bro. Parl. Ca. 457. note.
(*q*) 3 P. W. 266 in the

conveyance, and limited the estate to other uses; and as to other parts of the lands, though no remainder was vested in R., yet the father and son both joining amounted to a good disposition of it.

And in the case of *Forster* v. *Forster* (*r*), C., the father of J. and F., upon the marriage of his eldest son J., settled a freehold church lease, held for three lives, in trust to permit J. to enjoy it for his life, and then his wife to enjoy it for her life, and, subject to a charge for younger children's portions, in trust for the heirs males of the body of J., and in default of such issue, in trust for the heirs males of the body of the said C., and in default of such issue to the right heirs of C. The wife of J., and the only son of J. by his wife being dead, and there being daughters of the marriage, J. made a settlement of the church lease, and levied a fine *sur concessit*, and died without issue male. Upon the death of J. without issue male, F. claimed title to the leasehold premises, insisting that by this settlement his eldest brother was only tenant for life, and that the limitations to the heirs males of his body were words of purchase, and created a contingent remainder to his heirs

(*r*) 2 Atk. 259.

males; and that the limitation to the heirs males of the body of his father C., was a contingent remainder, to take effect in the person who should be the heir male of the body of the father, at the time of the death of J., and that J. could not be the heir male of the body of his deceased father, within the meaning and operation of the deed, because a life estate was expressly limited to him, and in the case of a descendible freehold it vests in the heir, not as heir, but as special occupant; and that J. could never take as occupant under the description of heir male, because the occupancy could not arise till after his own death; and therefore that the heir male, who was to take the contingent remainder, must be F., *viz.* the heir male of C. at the death of J., the tenant for life; and that if J. was but tenant for life, his settlement and fine *sur concessit* could not bar the contingent remainder, which ought to take place in F.

But on the other side it was insisted, that the limitation to the heirs of the body of the father was not a contingent remainder, but operated as words of limitation, and must mean the heirs male at the death of C.; that J. was the heir male, and that his wife and son being dead, his life estate and the limitation to him as heir male, were united; and

in the case of an inheritance he would be tenant in tail in possession ; and in case of a descendible freehold, he had the whole interest in him, and might dispose of it as he pleased.

And Lord *Hardwicke* was of this opinion, and said, that as tenant for life and the person in remainder, in nature of a tenant in tail, of a freehold lease, could certainly join and bar the settlement, so the same person who had both these interests in himself, as J. certainly had, might also bar the intail of the freehold lease. And though it seemed absurd, that the person who had an express estate for his life should also be the occupant, which occupancy in strictness did not arise till the death of the tenant for life, yet in reality the limitation, which in the case of an estate of inheritance would create an estate tail, did in the case of a freehold, give the party the whole interest, so as to empower him to dispose of it; and his Lordship put this case ; suppose a second son tenant for life of such a freehold lease, remainder to the heirs of the body of the father, the tenant for life, and the eldest brother, the heir of the father, might certainly bar the intail ; and therefore where the same right is in one and the same person he could certainly do it.

It appears, therefore, that where a lease *pur autre vie* is limited to one in tail, he may by lease and release, or any other conveyance proper for passing estates of freehold, bar his own issue and all remainders over, and make a complete disposition of the whole.

The following case, and Mr. *Fearne*'s opinion, are inserted in Mr. *Powell*'s edition of the Essay (*s*). The first tenant in tail of a freehold lease, which he took subject to a mortgage, joined with the mortgagee afterwards in an assignment by lease and release to another person, who paid off the first mortgage, and the assignment was expressed to be made subject to the old equity of redemption, then subsisting under the first mortgage; and a doubt arose whether this was such a disposition as would bar the entail. And Mr. *Fearne* admitted, that a question might have been made, whether the tenant in tail's concurrence in such an assignment, barely to pay off the mortgage money, would have amounted to such a disposition as would bar the entail; but he was clearly of opinion, that if the consideration, for securing of which the assignment was made, did not consist wholly of principal money, then due upon the old mortgage made by the testator, but included

(*s*) V. 2. p. 322.

some arrears of interest, due upon the principal money owing upon the old mortgage when the account was stated, the turning of this interest into principal, and thereby increasing the sum charged upon the lands, by making such lands a security for a greater sum after the assignment, than they stood subject to before, under the old mortgage, was in fact the creation of a new equity of redemption, and consequently amounted to a disposition of, or act of absolute ownership exercised over the whole estate which was the subject of the devise, and therefore effected a bar.

And in *Baker* v. *Bayley* (*t*), where A. having settled an estate, which he held for three lives, to the use of himself in tail, remainder to D., surrendered the old lease, and took a new one to himself; D. brought a bill to have the benefit of the remainder preserved to him: the court held the remainder void, and dismissed the bill, saying, that if it were good it might be barred by deed or *surrender*, or other conveyance without a common recovery.

So it seems by *Blake* v. *Blake* (*u*), that a *quasi* tenant in tail, of the trust estate of a

(*t*) 2 Vern. 225. R. 289. Coop. 178.
(*u*) 3 P. W. 10. n. 1. 6 T.

lease for lives, may bar the limitations over, by the mere renewal of the lease, even without the concurrence of the trustees, and notwithstanding prior existing trusts.

And, in that case, Lord *Kenyon* (*x*) appeared inclined to think, that a *quasi* tenant in tail of such an estate, might defeat the remainders by his will alone; but that opinion was strongly controverted by Lord *Redesdale*, C. of I., in *Campbell* v. *Sandys* (*y*); his Lordship said, "I think the point ought to be very well considered, before any person ventures to make a decision according to that *dictum*. The whole law on the subject is founded on the principles, applied to the case of a fee simple conditional at common law; that the party had a power of alienation, the effect of which would be to devest the estate, under which the person claiming as heir of the body, or by virtue of a limitation over, was to take. If that estate was devested, the right of the issue, and of the remainder-man in default of issue, was destroyed, because the estate on which it was to depend was also destroyed. I can find no decision that at all warrants Lord *Kenyon's dictum*; I find that he only stated it as something that Lord *Northington* threw out in

(*x*) 6 T. R. 293. (*y*) 1 Sch. and Lef. 294.

Grey v. *Mannock;* I have not found any note of that case. On the other hand, in *Blake* v. *Blake*, it was never considered that a will could have such operation; for I find from my note of that case, that though the estate was devised, the argument did not turn on the will; nobody conceiving that the estate would pass by it, if the *quasi* estate tail subsisted at the death of the testator. The whole argument turned on the fact of the surrender of the lease, and the grant of a new lease to the *quasi* tenant in tail; and this was held to bar, because the estate was altered. The *quasi* tenant in tail had gained the absolute interest at law, and there was no equity to constitute him a trustee for his own issue, or for the remainder-man. I was of counsel myself in that cause: Baron *Eyre* was senior Baron, and gave the judgment in the absence of the Chief Baron; Mr. *Madocks* and Lord *Eldon* were also of counsel in the same cause; and I am persuaded that no such idea was entertained, either by the court of Exchequer, or by any of the counsel concerned, as that the will would have operated to bar the plaintiff. Few persons were better acquainted with decided cases, and especially those decided in his own time, than Mr. *Madocks;* and if that point had ever been decided by Lord *North-*

ington, we should probably have heard of it from him. On principle I think it impossible that a will can have that effect. A will, so far as it is a disposition of property, is a designation of a special heir, against the right of the person to whom the property would otherwise come, by what may be called devolution of law; but that cannot, from the nature of the instrument, have the effect of depriving of a right, a person who does not claim by devolution of law, but by virtue of a preceding gift or instrument. That must have been the ground on which it was established, that the will of a joint tenant cannot sever the jointure. It is an instrument by which the maker is enabled only to bar his heir at law or representative, but which cannot be allowed to alter the rights of third persons."

And in *Blake* v. *Blake* before cited, the Master of the Rolls acquiesced in the opinion of Lord *Redesdale* upon this point (*z*).

In *Dillon* v. *Dillon* (*a*), a *quasi* tenant in tail of a share in leaseholds for lives, died unmarried, and without issue, having by will disposed of her share; Lord *Manners*, C. of I., said, by her will she could not dispose of it,

(*z*) Coop. 185. (*a*) 1 Ball and Beat. 95.

for a will can only pass what a party has, and by her death without issue the estate was spent, and there was no interest for the will to operate upon.

But an estate *pur autre vie* may be limited to one for life, so as to confine his interest and power of disposition to his own life estate only.

Thus in the case of *Williams* v. *Jekyl* (*b*), where A., having a freehold estate for three lives to her, her executors, administrators, and assigns, assigned it, and all her right, title, and interest in and to the same, to a trustee to the use of her son S., for and during the term of his natural life, and from and after his decease to the use of his issue lawfully begotten, and for want of such issue to the use of A., her executors and administrators, during the residue of the term. Lord *Hardwicke* held, that S. took an interest for his life, and the whole residue of the lease vested absolutely in the issue, for he construed the words, for want of such issue male, to mean not leaving issue; and that the effect of the limitation was, to the son for life, and if he had any children, that they should have it abso-

(*b*) 2 Ves. 681.

lutely, and if he should have no child, then to A., her executors and administrators.

And it is the same thing, if the first limitation be for twenty lives all spending at the same time, since it amounts to no more than the life of the survivor of them.

V. It is observed in the essay, that wherever one limitation of a devise is taken to be executory, all subsequent limitations must likewise be so taken.

This rule is obviously applicable to the limitations of which we are treating; and it seems unnecessary to do more than refer to the explanation, given by Mr. *Fearne* and Mr. *Butler*, of the reasons upon which it is grounded.

VI. & VII. The same observation may be made, with regard to the two next propositions in the essay, *viz.* 1, that notwithstanding the rule, that if one limitation be executory, every subsequent one must be so likewise, yet a preceding executory limitation may be uncertain and contingent, when a subsequent limitation, though it be to take effect in future, may not be uncertain or conditional, (otherwise than in respect of the possibility of its expiration before the former vests or fails) but may be so limited as to take effect, either in default of the preceding limitation

taking effect at all, or by way of remainder after it, if that should take effect. And 2, that when a devise is made upon a condition annexed to a preceding estate, that is, when it is made after a preceding executory or contingent limitation, or is limited to take effect on a condition annexed to any preceding estate; if that preceding limitation or contingent estate never should arise or take effect, the remainder over will nevertheless take place, the first estate being considered only as a preceding limitation, and not as a preceding condition, to give effect to the subsequent limitation.

The decision in the above mentioned case of *Davies* v. *Speed* (*c*), appears to be irreconcilable with the doctrine in these propositions; and the propriety of that decision seems to be questionable.

In that case, the limitation to the right heirs of the husband, in its creation appears to have been capable of taking effect, either as a remainder or a substituted springing use; during the life of the husband it was uncertain in which way it would operate; but that must of necessity have been determined at his death; then, if he had left any person

(*c*) Ante, p. 66.

answering the description of heir of the bodies of himself and his wife, such person would have taken an estate tail under the springing use to him, with a vested remainder to the right heirs of the husband, which would have been liable to those modes of destruction to which other remainders of the same kind are subject; as the husband did not leave any person answering that description, there seems to have been no objection to the limitation to the right heirs of the husband immediately taking effect as a substituted springing use. (*d*)

The question, as to the validity of a limitation or trust, to take effect on the failure of a previous limitation which was void for its remoteness, was discussed by Mr. *Fearne*, in an opinion contained in his posthumous works. (*e*) On a conveyance to the use of A. for life, and after his decease to the use of trustees and their heirs, in trust to apply the rents in manner therein mentioned, until some son of D. should attain the age of 25 years, and to convey the estate to

(*d*) This construction seems to be conformable to the judgment in Doe d. Fonnereau v. Fonnereau, Doug. Rep. 487. 4th ed. Fearne 303.; and see Saund. on Uses and Trusts 1. 133.

(*e*) p. 283.

the use of the first son attaining that age, and the heirs male of his body, and for default of such issue to the uses therein mentioned, Mr. *Fearne* was of opinion, that the trust for the first son of D. attaining the age of 25 years, he having then no son born, exceeded the limits allowed for executory limitations or trusts; and he at first inclined to think, that, as the estate intended for the first son did not extend to the whole fee simple, the subsequent limitations were not dependent on the contingency of the first son's attaining the age of 25 years, but took immediate effect in interest out of the legal estate in the trustees, subject to the preceding charges, and to the contingent estate to the first son of D. attaining the age of 25 years; and that the subsequent limitations might be supported on this ground; but on reconsidering the case (*f*), he found it difficult to retain that opinion; and thought it might be solidly contended, that none of the subsequent limitations could be construed to vest, before the time limited for the preceding limitations, to the eldest son of D.; the consequence of which was, that if the former failed, as too remote, the latter did so likewise.

(*f*) p. 291.

The point in question has, in cases on wills, been determined agreeably to the last opinion. (*g*)

VIII. Whatever number of limitations there may be, after the first executory limitation of the whole interest, any one of them, which is so limited, that it must take effect (if at all) within 21 years after the period of a life then in being, may be good in event, if no one of the preceding executory limitations, which would carry the whole interest, and is absolute and indefeasible, happens to vest. But, when once any preceding absolute and indefeasible executory limitation, which carries the whole interest, happens to take place, that instant all the subsequent limitations become void, and the whole interest is then become vested.

The above cited cases of *Higgins* v. *Dowler* (*h*), *Massenburgh* v. *Ash* (*i*), the Duke of *Newcastle* v. the Countess of *Lincoln* (*k*), and *Heywood* v. *Maunder* (*l*), are authorities on this point, with regard to personal estate: and the application of the principles, on which the doctrine is founded, to limitations of real

(*g*) Essay on Executory Devises 508. n. (1).
(*h*) Ante, p. 29.
(*i*) Ante, p. 75.
(*k*) Ante, p. 90.
(*l*) Ante, p. 104.

estate, as well as personalty, is explained by Mr. *Butler*. (*m*)

IX. If the event upon which a future use is limited be of too remote a nature, the limitation is void in its creation, and no subsequent accident can make it good.

Thus if A. covenant to stand seised to the use of B., a stranger, and the heirs of his body, and in default of such issue to the use of C., a son of A. in tail, which appears to correspond with the case intended to be put by Mr. *Fearne* in this section (*n*), here the first limitation is void, and the subsequent one is an absolute future limitation to take effect after a dying without issue; and, therefore, though no heirs of the body of B. should ever exist, that event will not make good the limitation to C., which was too remote in its creation.

X. The distinctions arising under a will, as to the effect on a subsequent limitation, of the failure of a prior estate, by an event which happens between the time of execution, and the period of operation, *viz.* the death of the testator, do not apply to limitations by deed, where no such interval occurs.

(*m*) Essay on Executory Devises, p. 514. n. (1).

(*n*) See the Essay, 7th ed. n. (n).

When a future use has once vested, a subsequent limitation, which thereby becomes a contingent remainder, cannot by any accident afterwards enure as a conditional limitation or springing use; this is a direct consequence of the rule before discussed (*o*).

XI, XII, XIII. It is sufficiently established by the authorities cited in the essay, that estates in land cannot be determined in part only, and continue as to the residue, or vest and then cease, and again re-vest; but that a newly created rent may be granted, on a condition to cease during the nonage of any heir of the grantee; and that if a rent be granted to a man and his heirs, a power of entry for recovery of any arrears of the rent may be limited to him and his heirs, which future use may be transferred with the rent; and that as well offices and dignities, as a rent *de novo*, may be granted to commence *in futuro*, but the period for the commencement of the rent must not exceed the boundaries for the limitation of future uses.

XIV. It has frequently been alleged, that where a devisee is mentioned as a person in present existence, and the commencement of the estate devised is not expressly deferred

(*o*) Ante, p. 2.

to a future period, if the devisee be not a person capable at the death of the devisor, the executory devise will be void. If such a rule were established, the principle of it would apply to future uses; and accordingly in *Lamb* v. *Archer* (*p*), where it was contended, that if one make a feoffment to the right heirs of B., this is a good springing use, it seems this was denied by the whole court, because it is by way of present limitation; and they held that it would be different where it is future, as to the right heirs of B. after his death, a distinction which plainly shows a feoffment to uses to have been under consideration (*q*); but it appears by Mr. *Fearne's* examination of the cases, that no such rule has been established by any decision, and that it has no other foundation than the *dicta* of judges, propounded in the infancy of executory devises.

XV. Where a future use of inheritance is limited in contingency, the freehold and inheritance, in the mean time, if not otherwise disposed of, result to the grantor.

Thus in the before-mentioned case of *Woodliff* v. *Drury* (*r*), the judges held, that until the marriage, A. was seised in fee.

(*p*) 1 Salk. 225. (*q*) 2 Mer. 267. (*r*) Ante, p. 8.

And in the *Earl of Ormond*'s case (*s*), where A., tenant in tail, suffered a recovery to the use of his last will, it was held, by all the judges, that the use resulted to A. and his heirs, until he should express his will and intention concerning the same.

So, in *Sir Edward Clere*'s case (*t*), where one made a feoffment to the use of such person and persons, and for such estate and estates as he should limit and appoint by his last will in writing; one of the resolutions in the case was, that where a man makes a feoffment to the use of his last will, he has the use in the mean time.

But where there is no contingency in the limitation of the future use, except as to the time of taking effect in possession, there seems to be ground for contending, that so much only of the use as is undisposed of results to the grantor.

Indeed, Lord *Hale*, C.J., in *Weale* v. *Lower* (*u*) said, if a feoffment be made to the use of C. and his heirs after the death of A. and B., this is no remainder, but a future use, and the feoffee is seised in fee-simple, and not of a freehold descendible, determinable upon the deaths of A. and B. So if the limitation of a

(*s*) Hob. 348. (*t*) 6 Co. Rep. 17. b. (*u*) Poll. 65.

use be that after two years, or after the death of *John Stiles*, it shall be to the use of J. N. in fee; the feoffor hath the fee simple remaining in him until this future use come *in esse*.

But these propositions appear to be in opposition to the doctrine in *Co. Litt. 23* a., that when a man makes a feoffment in fee, without valuable consideration, to divers particular uses, so much of the use as he disposeth not is in him as his ancient use in point of reverter.

And in the case of *Penhay* v. *Hurrell* (*x*), which was a conveyance by A. to the use of trustees for 70 years, if A. should so long live, remainder to trustees for 3000 years, and from and after the death of A., and the determination of the term of 3000 years to B., his son, for life, with divers remainders over, it is said by Mr. *Fearne* (*y*), that, after solemn argument and a case stated to the judges, it was decreed that an estate for life resulted to A., and this appears to be consistent with the decree, as stated in the note in Mr. *Raithby*'s edition of *Vernon*'s reports.

So in *Pybus* v. *Mitford* (*z*), where A. seised in fee, covenanted to stand seised to the use

(*x*) 2 Vern. 370. (*y*) p. 26. (*z*) 1 Ventr. 372.

of his heirs male, begotten or to be begotten on the body of his second wife; upon the above-mentioned doctrine of Lord *Coke*, it was held by *Hale* C. J., and two other judges, that A. took an estate for his own life by implication, the use during his life being undisposed of.

And it is said by Lord *Bacon* (*a*), "If I bargain and sell my land after seven years, the inheritance of the use only passeth, and there remains an estate for years by a kind of subtraction of the inheritance."

Mr. *Fearne*, it is true, states the rule to be, that wherever there is an executory devise of the real estate, and the freehold is not in the mean time disposed of, the freehold and inheritance descend to the testator's heir-at-law; but the authorities cited by him will not, on examination, be found to establish so unqualified a rule; and although his statement of some of the cases may lead to a different conclusion, there seems to be reason to apprehend, that the observation, with regard to the inheritance, was intended to be applied to executory devises in contingency only; for in a former part of the essay (*b*), after an examination of the cases which have just been cited,

(*a*) Bacon's Reading on the Statute of Uses, 63.

(*b*) p. 48.

and *Wills* and others v. *Palmer* (*c*), and other cases on the same point, he infers from the cases, that when the use is not limited away during the whole life of the grantor, and there is a use limited which cannot commence till after his decease, whether that use be limited in the first instance, or be preceded by limitations for terms of years, or by uses of the freehold or inheritance that may determine in the grantor's life-time, the use results to the grantor for life, immediately in the first case, and in remainder expectant on the preceding uses in the other, where there is no express use limited to the grantor himself, inconsistent with such an implication. (*d*)

But he contends (*e*), that the circumstance of a term being expressly limited to the grantor, as in the above-mentioned cases of *Adams* v. *Savage*, and *Rawley* v. *Holland*, (*f*) is inconsistent with such an implication. Mr. *Butler*, in a note to the essay (*g*), expresses a doubt upon this point; it is a rule of law, he observes, which admits of no exception, that the freehold cannot be in abeyance; it may there-

(*c*) 5 Burr. 2615. 2 Black. Rep. 687.

(*d*) Upon this point see Mr. Saunders's Essay on Uses and Trusts, v. i. p. 130.

(*e*) p. 42. 43. 49.

(*f*) Ante 69.

(*g*) p. 41.

fore be enquired in whom, in the cited cases, it was considered to reside; it is evident that it could only reside in the ancestor, or in the trustees; now as the judges held the limitation to the heirs of the ancestor's body to be void, they could not consider the freehold to reside in the trustees; he concludes that it must therefore be considered to be vested in the ancestor; and that it cannot be a legal objection to that conclusion that it destroyed the term.

The same point, however, appears to have been similarly ruled in *Holcroft*'s case (*h*), where the conusees in a fine rendered the estate to the conusor, tenant for life, for eighty years then next following, if the conusor so long lived, and immediately after his decease, to the first begotten son of the conusor which afterwards he should beget, and the heirs male of his body, and so successively to the second and third sons, the remainder to H. and his heirs. The conusor had not any son afterwards. And the question on this part of the case was, when the render was to J. for eighty years, if he so long lived, and after his decease to his first son, &c. with remainder to H., in whom the freehold rested during the

(*h*) Moore's Rep. 487.

life of the conusor, or whether the remainders were void for want of a particular estate to support them; and it was agreed by the judges that the remainders were void, because the estate of freehold, during the life of the conusor, did not pass by the render out of the conusees, but the inheritance complete remained in the conusees. (*i*)

And in the above cited case of *Goodtitle* v. *Burtonshaw* (*k*), the court was of opinion there could be no resulting use in the settlor in that case.

XVII. But the profits of personal estate, limited in contingency, will accumulate for the benefit of the persons to attain a vested interest under the limitation.

If, therefore, in a settlement of personalty, the limitations are contingent, as for children who, being sons, shall attain 21, &c., and it is intended that the annual produce shall be applied during the suspense of vesting, it is necessary to insert a provision expressly directing the application. (*l*)

XIX. Future uses, where the person who is to take is certain, are devisable, and assignable in equity.

In *Roe* v. *Griffiths* (*m*) Lord *Mansfield* said,

(*i*) See ante, p. 70.
(*k*) Ante, 71.
(*l*) Fearne's Essay, 545. (1).
(*m*) 1 Black. 605.

that in *Selwyn* v. *Selwyn* (*n*) he was prepared to have shown, with the concurrence of all his brethren, that in all contingent springing and executory uses, where the person who is to take is certain, so that the same may be descendible, they are also devisable; that they were convertible terms.

And this doctrine was recognised and established by *Jones* v. *Roe* d. *Perry* (*o*), in which case the reasoning of the judges, though upon an executory devise, is clearly applicable also to limitations by deed.

Lord *Kenyon* C. J. said, if we consider the statute of wills, which first gave a power of disposing of real property by devise, it is matter of astonishment that this question should ever have arisen; for it enables persons *having* any manors, lands, &c. to devise; which must mean *having an interest* in the lands. There are two kinds of possibilities; the one, a bare possibility; that which the heir has from the courtesy of his ancestor, and which is nothing more than a mere hope of succession. Such a possibility, undoubtedly, is not the object of disposition; for if the heir were to dispose of it during the life of the ancestor, though it afterwards devolved

(*n*) 2 Black. 251. 2 Burr. 1131. (*o*) 3 T. R. 88.

on him from his ancestor, such disposition would be void. The other, a possibility, or contingency, like the present, and which is widely different from the former. Undoubtedly, he said, the statute of wills had been passed some time before any questions arose on executory devises; for they took rise in Queen *Elizabeth*'s time, and arose very rarely for some time afterwards. When they did, it was decided by degrees that they were descendible, releasable, and assignable; but it is contended that they were not devisable. But it is difficult to assign any reason, why they should be capable of disposition by one mode of conveyance, and not by another.

And *Buller* J. said, it was first contended that an executory devise was not transmissible; then, that it was not assignable; then, that it was not descendible; and, lastly, that it was not devisable. But if it be such an interest as is descendible, it seems strange to say that it is not also devisable. They must both be governed by the same principle. It was held to be descendible, because the person taking it has an interest in the lands which is known to the law, and will descend if the ancestor does not dispose of it; then if he has that interest, he has a right to dispose of it by his will. It is a sound distinction which

has been taken by my Lord Chief Justice, between a bare possibility, and a possibility coupled with an interest.

But it is observed by Mr. *Fearne* (*o*), that the decisions do not appear to reach those cases, where neither the contingent interest itself is transmissible from any person, until the contingency decides him to be an object of the limitation, nor the person or persons to or amongst whom the contingent or future use is directed, is or are in any degree ascertainable, before the contingency happens; as in the case of a contingent or executory limitation to the right heirs of J. S. (then living), where the description of the person to take, cannot be confined to or among any ascertainable person or persons during the life of J. S.; nor can it therefore be said in whom such interest is; nor consequently that it is in any body during that period: nor will it be transmissible or descendible, from any one dying before it becomes vested.

Future uses are assignable in equity for a valuable consideration; for as Lord *Hardwicke* observed in *Wright* v. *Wright* (*p*), an assignment operates by way of agreement or

(*o*) p. 371. (*p*) 1 Ves. 409.

contract, which the court considers as the engagement of the one to transfer and make good a right and interest to another.

Upon this principle an assignment of the bare possibility of the heir, during the life of the ancestor, is valid in equity.

Thus in *Hobson* v. *Trevor* (*q*), an agreement by A., on the marriage of his daughter, to settle one-third part of all such real estate as should descend to him on the death of his father, was carried into execution by the court.

And it has very recently been decided, that such a possibility may at law be bound by fine by way of estoppel.

In the case of *Helps* v. *Hereford* (*r*), T. and A. his wife, during the life of her father C., levied a fine to the uses of her marriage settlement, of lands at B., of which C. was seised in fee-simple. Afterwards C. died, leaving A. and another daughter his co-heiresses; and it was held that A.'s moiety of the lands at B. became subject to and bound by the uses of the settlement.

But in *Goodtitle* v. *Morse* (*s*), it was held, upon the authority of a *dictum* of Lord

(*q*) 2 P.W. 191.
(*r*) 2 Barn. & Ald. 242.
(*s*) T.R. 365.

Hardwicke in *Taylor* v. *Phillips* (*t*), that a surrender of such a possibility in copyhold lands does not bind the heir by estoppel.

Mr. *Fearne* states (*u*), that contingent executory interests, or possibilities, in lands of inheritance, may be passed at law by fine by way of estoppel; in support of which doctrine he refers to the cases of *Weale* v. *Lower* (*x*), and *Vick* v. *Edwards* (*y*), on contingent remainders; observing that it is wholly immaterial, as to operation of a fine, whether the future interest of the person levying it, in the lands of which it is levied, is a contingent remainder, or any other future or executory interest; the fine equally operates by way of estoppel to the person levying it, and those claiming under him.

This position, it will be observed, does not extend to those cases, to which the doctrine of estoppel does not apply.

The case of *Weale* v. *Lower* was a feoffment by A. to the use of himself for life, and after the death of himself and M. his wife, to the use of B. (his eldest son) for life, and after the death of A., M., and B., to the use of B., and the heirs male of his body, and for

(*t*) 1 Ves. 230.
(*u*) p. 551.
(*x*) Poll. 54.
(*y*) 3 P.W. 372.

default of such issue, to the use of the heirs of B.; B. had issue a daughter, and then by fine and indenture granted to D. for 500 years, to commence after the death of A.; B. died, M. died, A. survived; it was held that the estate limited to B. was a contingent remainder; for the particular estate was only for the life of A., whereas B.'s estate was not to commence till after the death of A. and M.; and though B. levied the fine for 500 years, and died before the contingency happened, yet his heir afterwards, when the contingency happened, was bound by the fine, and the lease for 500 years to D. took place; for it was agreed that the contingent remainder descended to his heir; and though the fine operated at first by conclusion, and passed no interest, yet the estoppel should bind the heir; that upon the contingency, the estate by estoppel became an estate in interest, of the same effect as if the contingency had happened before the fine was levied; that if the fine had been in fee, it would have barred the heir, and operated to the benefit of the possession, as the fine of a disseisee to a stranger; but being only for years, the fee was vested, and the term good being drawn out of the fee.

The case of *Vick* v. *Edwards* was a devise to two trustees, and the survivor of them, and the heirs of such survivor, in trust to sell; Lord *Talbot* C. held, that the trustees joining in a fine would pass a good title to the purchasers by way of estoppel; that the fee was in abeyance, and it was certain that one of those trustees must be the survivor and entitled to this future interest, and consequently his heirs would be barred by the fine of their ancestor. And he cited the case of *Weale* v. *Lower*.

The only point decided by *Weale* v. *Lower* was, that when the fee became vested in the heir of B., she was estopped from claiming in opposition to his fine. So in *Helps* v. *Hereford* (*z*), upon the death of C. a moiety of the land descended to A., and she was bound by the estoppel.

But these decisions clearly do not apply to cases, where no interest afterwards vests in the party, by whom the fine was levied; and the doctrine of Lord *Hardwicke*, in *Wright* v. *Wright* (*a*), appears to embrace all that can be collected from them. In law, his Lordship said, the heir may levy a fine of lands in the life of the ancestor, which will bind by estop-

(*z*) Ante. p. 160. (*a*) 1 Ves. 409.

pel after descent to him; so there is a method of conveying, that is, *preventing a claim against it.*

The authority of *Vick* v. *Edwards*, on the point in question, was disputed by Mr. *Fearne* himself (*b*); and another author, of great discrimination and judgment (*c*), has denied that the decision is founded on tenable grounds.

There does not, therefore, appear to be any authority for the position, that a future or conditional use may be transferred or passed at law by fine, except in cases to which the doctrine of estoppel applies; and it clearly cannot apply to those cases in which the fine operates as an extinguishment.

In *Buckler*'s case (*d*) it was resolved, that if the disseisee levy a fine to a stranger, the disseisor shall hold the lands for ever, for the disseisee against his own fine, cannot claim the land, and the conusee cannot enter, and the right which the conusor had cannot be transferred to him; but by the fine the right is extinct, whereof the disseisor shall take advantage. Upon which authority is apparently founded the observation in *Weale* v. *Lower*, that if the fine had been in fee, it would have

(*b*) p. 356.
(*c*) Preston on Conveyancing, p. 304.
(*d*) 2 Co. 56. a.

barred the heir, and operated to the benefit of the possession, as the fine of a disseisee to a stranger.

These cases appear to be in some degree analogous to a future or conditional use; and there is, therefore, ground for contending, that a fine levied by the person to whom the use is limited, would operate as an extinguishment of the use, and a confirmation of the estate of the person in possession. (*e*)

In the case of the Earl of *Kent* v. *Seward* and *Scott* (*f*), it seems to have been agreed, that a future use is not at law such an interest as is assignable.

In that case F., seised in fee of the manor of K., and of the manor of A., by fine, 41 *Eliz.*, conveyed the said two manors to the Earl of S. and his wife, to the uses following, *viz.*, of the manor of K. to the use of them, their heirs and assigns; and of the manor of A. to the use of the wife of F. for her life, and after to the use of the heirs of F., until his wife should evict and expel the said Earl or Countess, their heirs or assigns, their farmers, tenants, or lessees, of or from the manor of K., or any parcel thereof; and, after such eviction, then to the use of the said

(*e*) See Preston on Conveyancing, v. i. p. 208. 302.

(*f*) Cro. C. 358.

Earl and his wife, their heirs and assigns, until they should be satisfied with the profits for their loss. F., for money, by fine conveyed the manor of A. to R., his heirs and assigns. The Earl of S. and his wife afterwards by fine conveyed the manor of K. to the use of the Earl of K. and his wife, and the heirs of the Earl of K. Then R. devised the manor of A. to W. and others for 2000 years, and afterwards died seised of the said manor of A. Then F. died; after his death his wife evicted from the Earl of K. in dower, parcel of the manor of K. and entered; upon which the Earl of K. entered into the manor of A. upon the assignees of the said term, who re-entered; whereupon the Earl of K. brought an action of trespass; and whether his entry was lawful was the question. And after several arguments it was adjudged for the defendants, that the entry of the Earl was not lawful. And all the justices unanimously resolved, that the Earl of K., as assignee, might not enter, but that the use, upon the eviction, ought first to vest in the Earl of S. and his heirs; and that this conveyance, before the eviction, could not give to him title of entry as assignee; for the words "heirs and assigns" were to be taken as words of limitation, *viz.*, that the Earl of S., by his en-

try, should have it by limitation to him, his heirs, and assigns; and that it should not first vest in the assignee as purchaser, and it was not such an interest as was assignable over before eviction, and the power of entry was not transferred with the manor of K.

But it has been held, that a contingent future use, limited for the purpose of securing, and to arise on the nonpayment of rent, may be transferred with the rent.

Thus, in *Havergill* v. *Hare* (*g*), W., by indenture, granted a rent to I., his heirs, and assigns, with clause of distress, and covenant to levy a fine of the lands, to the use, intent, and purpose, "that if it shall happen the said yearly rent be behind and unpaid, and that no sufficient distress can be found upon the premises, or any rescous, pound-breach, or replevin shall happen to be made, that then and from thenceforth it shall and may be lawful for the said I., his heirs and assigns, into the said lands to enter, and to have and enjoy the rents thereof, until the said rent, with the arrears thereof, if any be arrear, be fully satisfied to the said I., his heirs or assigns."

I. bargained and sold the rent to W., with all penalties, forfeitures, and advantages com-

(*g*) Cro. J. 510.

prised in the said indenture. Afterwards W. levied a fine to the uses of the indenture; and one question was, whether this contingent and future use, to rise upon non-payment of the rent, was transferable over by this bargain and sale; for it was strongly urged by the defendant's counsel, that it was a matter in privity and possibility only, which was not transferable before it fell *in esse*. But all the justices resolved, that it being a matter of inheritance, and being for the security of the payment of rent, and waiting upon the rent, might well be transferred with the rent, and by the grant of the rent the penalty and advantage well passed; but if it had been a mere possibility, or a contingent estate, not coupled with any other estate, then it had not passed.

Future interests in personal estate are assignable in equity, upon the principle of a contract, which the court will carry into execution. (*h*) Such interests are also clearly devisable.

In *Wright* v. *Wright* (*i*), Lord *Hardwicke* said, the court admits the contingent interests of terms for years to be disposed of for valuable consideration, though the law does not;

(*h*) Ante, p 159. (*i*) 1 Ves. 409.

and further permits them to be disposed of by will; and that he should not doubt, that in the case of an assignment of a contingent interest in a term for years, not for money, but for a younger child, the court would make it good. But he afterwards observed, that if the question had been between the child so advanced and a *bonâ fide* creditor, the equity of the creditor would have prevailed.

XX. A springing use or conditional limitation in real estate, if the person to whom it is limited die, before the contingency on which it is to arise happens, will, if not otherwise disposed of, descend to his heir-at-law. Thus, in the above cited case of the Earl of *Winchelsea* v. *Wentworth* (*i*), it was decreed that the land should go to the heir of the sister.

It is fully established, by the authorities cited and referred to in Mr. *Fearne*'s Essay (*k*), that an executory devise vests in the person who is heir-at-law of the devisee, at the time of the contingency happening; and there can be no difference in this respect, between limitations by deed and by will; the claimant must make himself heir to the first purchaser.

(*i*) Ante, p. 9. (*k*) 7th ed. p. 560.

A future interest in personal estate is transmissible to the personal representatives.

In the case of *Peck* v. *Parrot* (*l*), B., in consideration of natural love and affection for her niece, and to secure to her separate use her personal estate after her own decease, granted all her personal estate to trustees, in trust for herself during her natural life, and after her decease and payment of her debts and funeral expenses, in trust for the sole and separate use of her niece alone, and not for her husband, or for such person as she should appoint. The niece died in the lifetime of B., and after B's death, her (B's) executor and residuary legatee, filed his bill against the personal representative of the niece, for this personal estate.

Lord *Hardwicke* said, that under a trust, a contingent interest might go to the executor or administrator, though not vested in the person during his life; and that in the same manner, the contingent interest here would go to the representative of the niece, and accordingly dismissed the bill.

XXI. In the case of future limitations, whether of the legal or of the equitable estate, the court of Chancery will interfere, to prevent

(*l*) 1 Ves. 234.

the commission of waste by the tenant in possession, as may be collected from the observations of Lord *Eldon* C. in *Stansfield* v. *Habergham.* (*m*)

His Lordship said, he should, by dissolving that injunction, contradict what had been understood to be the doctrine of that court; that, where there is an executory devise, even of a legal estate, that court would not permit the timber to be cut down; more especially not, if there is an executory devise of a trust estate. It cannot be denied, his Lordship observed, that upon this subject the court had already abridged legal rights. But if that protection were not given, it would be very easy to disappoint the intention in almost every settlement, by deed or will, as to timber.

(*m*) 10 Ves. 279.

ANALYTICAL INDEX.

CHAPTER THE FIRST.

Springing uses and other limitations corresponding with executory devises, defined and distinguished.

Page

I. Conditional limitations, secondary, future, springing or shifting uses, are limitations of future estates or interests in real property, which the law admits in deeds operating under the statute of uses, though contrary to the rules of limitation in conveyances at common law, and which arise upon an event provided for by the deed which creates them. - 1

Consideration of the question, whether, where there is a limitation after a contingent estate in fee simple, and the ulterior estate is so limited as to take effect in defeasance of the estate first limited, on an event subsequent to its becoming vested, the ulterior limitation can operate as a springing use; and whether the case of Gulliver *v.* Wickett be an authority for that doctrine. - - 10

Page

II. Where a particular estate of freehold is first limited, capable in its own nature of supporting a remainder, followed by a limitation, not immediately connected with or commencing from the expiration of the particular estate of freehold, the latter limitation is incapable of taking effect as a remainder, but may operate as a conditional limitation or springing use, if confined to the requisite limits of time. 24

III. Conditional limitations, secondary, future, springing or shifting uses, may be distinguished into two kinds: the first sort is, where the whole fee simple is first disposed of, but upon some contingency that disposition is qualified, and another estate is limited to arise: the second is, where, without any disposition of the immediate fee, a future estate is limited to arise, either upon a contingency, or at a period, or on an event certain, unpreceded by, or not having the requisite connection with, any immediate freehold to give it effect as a remainder. - - 25

IV. Dispositions of personal estate for one for life, or otherwise, and after his decease, or some other contingency or period, for another person, are usually effected by deed, by way of declaration or trust. 27

V. Observations on some circumstances, relative to the degree or quality of the property, acquired by persons taking a limited or restricted interest for life, &c. in chattels personal, under limitations of trusts, and respecting settlements by persons indebted. 33

Observations relative to post-nuptial settlements, and settlements by traders. - 42

CHAPTER THE SECOND.

General qualities of springing uses, and other limitations corresponding with executory devises.

Page

I. The future uses under consideration differ from contingent remainders; first, because such uses can only be limited in conveyances which derive their effect under the statute of uses; secondly, because they require no preceding estate to support them; thirdly, because if there be any preceding estate, it is not necessary that the future uses should vest when such preceding determines; fourthly, because the principle of such future uses applies to personal estate as well as real; and, fifthly, because the future uses cannot be prevented or destroyed, by any alteration whatsoever in the estate out of which, or after which, they are limited. - - 47

Consideration of the question, whether, where there is a limitation in fee subject to a springing use, the springing use may be barred by a fine, levied by the tenant in fee before the time at which the springing use is to take effect, and non-claim for five years after the right of entry under it accrues. - - 51

Consideration of some opinions, relative to the liability to destruction of executory devises, (and consequently of springing uses,) in cases similar to Gulliver *v.* Wickett. - - 54

II. In the case of a limitation in fee simple, with a limitation over upon a dying without issue living to A., the limitation over would be good as an executory devise, or springing use; but if the first limitation had been

Page

in tail only, the subsequent limitation might have been considered as a contingent remainder, depending on that estate tail, and to take effect only on the determination of the estate tail in the lifetime of A. - - - 60

This construction adopted in favor of the intention. - - - 61

III. Future limitations of chattels are equally secure as of real estates, against the disposition of the persons entitled to the preceding a limited interests therein. - - - - 62

IV. The union of a term with the inheritance, by a surrender to, or any act done by, a person having notice of the trust, will not in equity be allowed to defeat the future limitation. - - 63

V. When in lands of inheritance an estate tail is first limited, and then a conditional limitation is made upon that estate, a recovery suffered by the tenant in tail, before the event or condition happens on which the ulterior use was to arise, will bar the estate depending on that event or condition. - *ib.*

VI. This privilege of conditional limitations, and future or springing uses, which exempts them from being barred or destroyed, is the foundation of an invariable rule, that the contingency on which an estate of this sort is permitted to take effect, shall be such as must happen within a short space of time, such as a life in being, or some few years after. - - - - - - 65

CHAPTER THE THIRD.

Of springing uses, and other limitations, &c. upon failure of heirs or issue.

I. Wherever a future use is limited to take effect after a dying without heirs, or without issue, subject to no other restriction, the limitation is void. - - 77

Page

II. The like rule holds in the limitation of a term or personal estate. - - - - 81

III. The limitation of a personal estate to one in tail vests the whole in him. - - - 87

Consideration of the effect of executory limitations of personalty, by reference to the limitations of real estate in strict settlement, and of the usual qualification of limitations of personalty, by reference to such limitations of real estate. - - 90

IV. Consideration of the question, whether the rule, that where there is a devise over, after a dying without heirs, to a person who is a relation of and capable of being collateral heir to the first devisee, the first devisee takes only an estate tail, be applicable to these future uses. - - - - 98

V. That a limitation may be to one and his heirs, with a future use to take place on an event, which must happen within the compass of a life in being. 102

VI. Upon the same principle, where the dying without issue is restrained to the period of a life in being, a future trust thereon limited will be good. - - - 103

VIII. It is the same, if the dying without issue be confined to the compass of twenty-one years after the period of a life in being. - - - - 105

IX. With respect to future trusts declared by deed, as well as executory devises, of terms for years, or other personal estates, the court of chancery has very much inclined to lay hold of any words in the deed, to tie up the generality of the expression of dying without issue, and confine it to dying without issue living at the time of the person's decease. - *ib.*

X. But in the case of a real estate, it seems, the construction is generally otherwise. - - - - 110

Consideration of the grounds of that distinction. - - - - - 111

Page

XI. In cases of personal estate, where such restrictive circumstances as have been mentioned appear, it matters not whether the term, or other personal estate, be limited to the first person indefinitely, or for life expressly, or to him and his heirs, or the heirs of his body, or his issue or children, as the restriction is equally valid under any of these circumstances, and gives effect to the limitation over. 116

XII. And in the construction of these cases, whether arising upon wills or deeds, the general rule appears to be, that, although in the limitation of personal estate, after a dying without issue, these words shall not, *ex vi termini*, and without the concurrence of any other circumstance of intention, signify a dying without issue then living, even though the limitation is in the nature of an estate tail by implication only, yet, on the other hand, they shall not, *ex vi termini*, where there is any other circumstance of intention, import an indefinite failure of issue, even though the limitation is in the nature of an express estate tail. - - - - - - - 117

XIII. With respect to the validity of the limitation over, it is the same thing, in settlements of personal estate, whether the first limitation be to one for life expressly, and if he die without issue, remainder over; or to one (indefinitely), and if he die without issue remainder over. The only difference appears to be, that, in the former case, there is more ground than in the latter, to contend for a resulting trust for the settlor. - - - - - 119

XIV. Though a limitation in tail or in fee to one *in esse*, after a dying without issue, is void, yet a limitation for life to one *in esse*, to take place after a dying without issue, may be good. - - - 120

CHAPTER THE FOURTH.

Of other matters relating to springing uses, and other limitations corresponding with executory devises.

Page

I. If a term be limited for one for life, and afterwards for the heirs of his body, those words are generally words of limitation, and the whole vests in the first taker; but if there appear any other circumstance or clause in the deed, to show the intention, that these words should be words of purchase, and not of limitation, the ancestor takes for life only, and his heir will take by purchase. - - - 125

II. A trust of a term for a person not *in esse*, if confined to take effect within the limits before expressed, is now held to be good. - - - - 131

III. Limitations of an estate *pur autre vie*, in such a manner as would give an estate tail in lands of inheritance, do not confer an estate tail, properly so called, or operate as springing or future uses, but convey to the party an estate of freehold, descendible to the heirs of his body, and a limitation over to take effect on failure of such heirs is a good remainder. Any person entitled for the time being, under the first limitation, may dispose of the whole, and bar both the issue and the remainders over, by deed, surrender, or even articles, *but not by will*; if he make no such disposition of the land, the person in remainder will be entitled to it, on the expiration of the first estate. - - - - *ib.*

V. The rule, that wherever one limitation of a devise is taken to be executory, all subsequent limitations must likewise be so taken, is applicable to the limitations in question - - - - 143

VI. Also the two next propositions: that notwithstand-

Page

ing the rule, that if one limitation be executory, every subsequent one must be so likewise; yet a preceding executory limitation may be uncertain and contingent, when a subsequent limitation, though it be to take effect in future, may not be uncertain or conditional (otherwise than in respect of the possibility of its expiration before the former vests or fails), but may be so limited as to take effect, either in default of the preceding limitation taking effect at all, or by way of remainder after it, if that should take effect. - - - - - 143

VII. And that when a devise is made upon a condition annexed to a preceding estate, that is, when it is made after a preceding executory or contingent limitation, or is limited to take effect on a condition annexed to any preceding estate, if that preceding limitation or contingent estate never should arise to take effect, the remainder over will nevertheless take place; the first estate being considered only as a preceding limitation, and not as a preceding condition, to give effect to a subsequent limitation. - 144

Consideration of the case of *Davies* v. *Speed*, with reference to the doctrine in the two last propositions. - - - - - *ib.*

Consideration of the question, as to the validity of a limitation or trust, to take effect on the failure of a previous limitation, which was void for its remoteness. - - - - 145

VIII. Whatever number of limitations there may be, after the first executory limitation of the whole interest, any one of them, which is so limited that it must take effect (if at all) within twenty-one years after the period to a life then in being, may be good in event, if no one of the preceding executory limitations, which would carry the whole interest, *and is absolute and indefeasible*, happens to vest. - - 147

Page

IX. If the event upon which a future use is limited be of too remote a nature, the limitation is void in its creation, and no subsequent accident can make it good. - - - - - 148

X. The distinctions arising under a will, as to the effect on a subsequent limitation, of the failure of a prior estate, by an event which happens between the time of execution, and the period of operation, *viz.* the death of the testator, do not apply to limitations by deed, where no such interval occurs. - - *ib.*

XI. XII. XIII. Estates in land cannot be determined in part only, and continue as to the residue, or vest, and then cease and again re-vest; but a newly created rent may be granted, on a condition to cease during the nonage of any heir of the grantee; and if a rent be granted to a man and his heirs, a power of entry, for recovery of any arrears of the rent, may be limited to him and his heirs, which future use may be transferred with the rent; and as well offices and dignities, as a rent *de novo*, may be granted to commence *in futuro*; but the period for the commencement of the rent must not exceed the boundaries for the limitation of future uses. - - 149

XIV. It has been alleged, that where a devisee is mentioned as a person in present existence, and the commencement of the estate devised is not expressly deferred to a future period, if the devisee be not a person capable at the death of the devisor, the devise will be void. If such a rule were established, the principle of it would apply to future uses, but no such rule has been established by any decision. - *ib.*

XV. Where a future use of inheritance is limited in contingency, the freehold and inheritance in the meantime, if not otherwise disposed of, result to the grantor. - - - - - 150

Consideration of the questions, whether, where there is no contingency in the limitation of the

Page

future use, except as to the time of taking effect in possession, so much only of the use as is undisposed of results to the grantor. - - 151

And whether the circumstance of a term being expressly limited to the grantor, will prevent a resulting use by which that term would be destroyed. - - - - - 154

XVII. The profits of a personal estate, limited in contingency, will accumulate for the benefit of the persons to attain a vested interest under the limitation. 156

XIX. Future uses, where the person who is to take is certain, are devisable and assignable in equity. - *ib.*

An assignment of the possibility of the heir is valid in equity; and such a possibility may at law be bound by fine by way of estoppel. - - 160

Consideration of the question, in what cases a future or conditional use may be transferred or passed at law by fine. - - - 161

A contingent future use, limited for the purpose of securing, and to arise on the non-payment of rent, may be transferred with the rent. - - 167

Future interests in personal estate are assignable in equity, and devisable. - - - 168

XX. A future interest, whether in real or personal estate, is transmissible to the representatives of the person to whom it is limited, when such person dies before the contingency happens. - - - 169

XXI. In cases of future limitations, whether of the legal or of the equitable estate, the court of chancery will interfere, to prevent the commission of waste by the tenant in possession. - - - - 170

FINIS.

Printed by A. Strahan, Law-Printer to His Majesty,
Printers-Street, London.

LAW BOOKS,

PUBLISHED BY

J. AND W. T. CLARKE.

GILBERT ON TENURES, BY WATKINS.

In 8vo. *price* 15*s. boards,*

The LAW of TENURES; including the Theory and Practice of COPYHOLDS. By the late Lord Chief Baron GILBERT. With an Historical Introduction on the Feudal System, and copious Notes and Illustrations. By CHARLES WATKINS, Esq., of the Middle Temple, Barrister at Law, Author of an Essay on the Law of Descents, &c. The Fifth Edition, with the Annotator's last Corrections and Additions; and prepared for the Press by Robert Studley Vidal, Esq., of the Middle Temple.

WATKINS' CONVEYANCING, BY PRESTON.

In 8vo. *price* 12*s. boards,*

PRINCIPLES of CONVEYANCING, designed for the Use of Students, with an Introduction on the Study of that Branch of Law. By CHARLES WATKINS, Esq., of the Middle Temple, Barrister at Law. The *Fourth Edition*, with the Author's last Corrections, *and with very considerable Additions.* By RICHARD PRESTON, Esq., Barrister at Law.

Since the publication of the last Edition, the Publishers have received from Mr. Watkins' Executor, (Robert Studley Vidal, Esq.) the Copy of the Work, as finally revised by the Author himself; they have therefore availed themselves of this opportunity of introducing such Additions into the present Edition as are not contained in any former Edition.

WATKINS ON DESCENTS.

In 8vo. *price* 12*s. boards,*

An ESSAY on the LAW of DESCENT, with the Distribution of Personal Effects of Intestates. By CHARLES WATKINS, Esq. *Third Edition*, with Notes by Robert Studley Vidal, Esq., the Author's Executor.

"*The invaluable Essay of Mr. Watkins on Descents, an Essay that deserves the Student's most serious attention, should be studied with particular care.*" See Preston on Abstracts.

WATKINS ON COPYHOLDS.

In 2 thick volumes 8vo. *price* 1*l.* 13*s. boards,*

A TREATISE on COPYHOLDS. By C. Watkins, Esq., Barrister at Law. The *Third Edition*, corrected and much enlarged from the Author's Papers; and further augmented with Notes of all the more recently adjudged Cases on the Subject, down to the present Period, by Robert Studley Vidal, of the Middle Temple, Esq., the Author's Executor. To this Edition is also added, an Appendix of Manorial Customs, &c.

"*Mr. Watkins's Treatise contains nearly every thing that is useful; and it is hardly too much to say of it, that it is one of the best practical books in the Law.*" See Preston's Abstracts, 228.

BUTLER'S COKE LITTLETON.

In two large volumes royal 8vo., with a comprehensive Index,
Price 3l. 3s. boards,

The INSTITUTES of the LAWS of ENGLAND; or, A Commentary upon Littleton. Not the Name of the Author only, but of the Law itself. By Sir Edward Coke. Revised and corrected, with Additions of Notes and References. By F. Hargrave and C. Butler, Esqrs., of Lincoln's Inn. Including also, the Notes of Lord Chief Justice Hale and Lord Chancellor Nottingham; and an Analysis of Littleton, by C. Butler, Esq. The *Eighteenth Edition, corrected.*

The Notes are printed under the Text, and a regular System of paging and reference adopted.

This is the edition containing Mr. Butler's Notes.

BARTON'S ELEMENTS OF CONVEYANCING.

In *five volumes royal* 8vo., *with Indexes complete,*

ELEMENTS OF CONVEYANCING, in Theory and Practice; with cursory Remarks upon the Study of that Science, and Observations and Directions relative to the Practice of Conveyancing. The Second Edition, revised, with great Additions and Improvements.

By Charles Barton, Esq., Barrister at Law.

This Work treats of Land, Advowsons, Tithes, Commons, Ways, Offices, Dignities, Franchises, Rents, Annuities, Fee Simple, Fee Tail, Estates for Life, Issue Extinct, Courtesy, Dower, Jointure, Estates for Years, at Will, by Sufferance, Ancient Demesne, Gavelkind, Borough English, Condition, Mortgages, Joint Tenancy and in Common, Coparcenary, Remainder and Reversion, Uses, Trusts, Agreements for Contracts, of a Release, Confirmation, Surrender, Assignment, Defeasance, Bargain and Sale, Lease and Release, Fine and Recovery, Devise and Descents.

"*Mr. Barton's Elements will be found a useful part of the Law Library of a Conveyancer.*" See Preston's Abstracts, vol. i. p. 214.

In 8vo. *price* 14*s. boards,*

A PRACTICAL TREATISE on the LAW of LEGACIES.
By W. S. Preston, Esq., of Lincoln's Inn.

SCHOOL OF LAW LIBRARY
UNIVERSITY OF CALIFORNIA

UC SOUTHERN REGIONAL LIBRARY FACILITY
A 000 695 374 9